Supreme Court, U.S.
FILED

No. 021550 MAR - 7 2003

In the
Supreme Court of the United States

AZHAR LAL,

*Petitioner,*

v.

ERNEST ROE, Warden, California State Prison, Los Angeles, and PEOPLE OF THE STATE OF CALIFORNIA,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Where petitioner's appointed counsel attended an in-chambers conference with the presiding criminal judge at which he stated he believed he was in a conflict of interest regarding his representation of petitioner, and petitioner was neither given an opportunity to be present or informed that the conference had taken place, was petitioner denied due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and denied his right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution?

2. Could the lower courts determine, consistent with petitioner's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, that *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) precluded any finding that defense counsel was in a conflict of interest, where, although petitioner disputed defense counsel's allegations of wrongdoing, no evidentiary hearing was ever held, the courts simply accepting defense counsel's assertions as if they had been proven?

3. Where petitioner's appointed counsel attended an in-chambers conference with the presiding criminal judge at which he stated he believed he was in a conflict of interest regarding his representation of petitioner, and the judge neither conducted an inquiry into the conflict nor informed petitioner that the conference had occurred, was petitioner denied due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and denied his right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution?

4. Concerning questions 1, 2, and 3, assuming these errors were established, does petitioner's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution

and right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution require reversal without consideration of whether the error was harmless?

5. Did petitioner's appointed counsel have a conflict of interest that adversely affected his performance, so that his remaining as petitioner's counsel over petitioner's objections deprived petitioner of his right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and denied his right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution?

6. Where petitioner was a subject of the United Kingdom and was brought before the jurisdiction of the trial court by extraditing him from the United Kingdom, was it an enforceable condition of his extradition that he be afforded the right to "legal assistance of his own choosing" if this was reasonably feasible, and if so, was he denied this right when the trial courts repeatedly denied his motions to have new defense counsel appointed?

## LIST OF ALL PARTIES

**Petitioner**

AZHAR LAL

**Respondents**

ERNEST ROE, Warden, California State Prison - Los Angeles
PEOPLE OF THE STATE OF CALIFORNIA.

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The orders are unpublished. A copy of the orders of the Ninth Circuit and district court are attached as an appendix.

## Basis for Jurisdiction in the Supreme Court

1. Date of entry of order sought to be reviewed: October 18, 2002 (memorandum opinion), December 11, 2002 (order denying petition for rehearing / rehearing *en banc.*

2. Date of any order respecting rehearing: December 11, 2002

3. Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: 28 U.S.C. §1254(1).

## Constitutional Provisions and Statutes Involved

### United States Constitution

**Fifth Amendment.** No person shall be ... deprived of life, liberty, or property, without due process of law...

**Sixth Amendment.** In all criminal prosecutions, the accused shall enjoy the right to ... to be confronted with the witnesses against him... and to have the Assistance of Counsel for his defence.

**Fourteenth Amendment.** Section. 1. ..... No State shall ... deprive any person of life, liberty, or property, without due process of law...

## Treaties

**European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6, section 3:** Everyone charged with a criminal offence has the following minimum rights:...c to defend himself ... through legal assistance of his own choosing...

**International Covenant on Civil and Political Rights, Article 14, paragraph 3.** In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (b) To communicate with counsel of his own choosing ... (d) To ... defend himself ... through legal assistance of his own choosing...

## State Statutes

**California Penal Code section 187.** (a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought. (b) This section shall not apply to any person who commits an act that results in the death of a fetus if any of the following apply: (1) The act complied with the Therapeutic Abortion Act, Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code. (2) The act was committed by a holder of a physician's and surgeon' s certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not. (3) The act was solicited, aided, abetted, or consented to by the mother of the fetus. (c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law.

**California Penal Code section 190.2.** (a) The penalty for a defendant who is found guilty of murder in the first degree is death or

imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true: .... (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: (A) Robbery in violation of Section 211 or 212.5... (G) Burglary in the first or second degree in violation of Section 460.

**California Penal Code section 211.** Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

**California Penal Code section 1054.3.** The defendant and his or her attorney shall disclose to the prosecuting attorney: (a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial. (b) Any real evidence which the defendant intends to offer in evidence at the trial.

## STATEMENT OF THE CASE, INCLUDING BASIS OF JURISDICTION IN FEDERAL COURT

### 1. Basis of jurisdiction in federal court

The basis for jurisdiction in the federal court in the first instance was 28 U.S.C. section 2254.

## 2. Statement of the Case

### a. Lal's extradition

Lal is a British subject and was arrested in England. The United States of America formally requested Lal's extradition on two charges: murder, and burglary of a structure. (ER 162-163). The information filed in the Superior Court in Sacramento, however, charged Lal with murder (Penal Code section 187), residential burglary (Penal Code section 459), robbery (Penal Code section 211), and two felony murder special circumstances, alleging that Lal committed the murder in the course of a burglary and robbery. (Penal Code section 190.2(a)(17)).[1] Lal was convicted and sentenced to life without possibility of parole.

### b. Proceedings in trial court.

#### (1) Facts relating to Lal's representation by appointed counsel.

##### (a) Introduction

No evidentiary hearing has ever been held in this case on the issue of trial counsel's representation of Lal. Trial counsel was never called to testify as a witness and was never subjected to cross-examination concerning his actions. This is of critical importance, since all courts have relied on this Court's opinion in *Nix v. Whiteside,* 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) in denying Lal relief – an opinion based on a fully developed record in which trial counsel testified and was cross-examined.

The trial court held various pre-hearings on motions Lal brought

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[1] The information apparently exceeded the scope of the extradition order.

for appointment of new counsel. After he was convicted, Lal filed a motion for new trial and submitted a supporting declaration. In response, the prosecutor submitted a declaration by trial counsel in which counsel specifically ***declined*** to respond or comment directly "concerning the nature or content of communications between myself and Mr. Lal" because there had been no waiver of the attorney client privilege. The trial court did not take evidence at the hearing on the motion for new trial and trial counsel was never required to testify or be cross-examined. Later, trial counsel sent an unsworn letter and a declaration to Lal's new counsel, which Lal submitted as part of his post-conviction relief petitions. All of these are discussed in more detail below.

**(b) Lal's initial statement to the British police.**

When Lal was initially arrested in England, Detective Sergeant Christopher Wilson interviewed him. Lal admitted that he was in the victim Arons' home on June 10, 1988, but denied killing Arons. Lal said that another man had been in the house with the victim: an "Englishman" about Lal's height, stocky build, blond hair, and a small moustache, whom Lal had seen about three times before. This man was arguing with Arons, saying that Arons had caused him trouble at his club. The Englishman took two large kitchen knives cut Lal on the left arm and right leg. Lal escaped by running out the back door. Arons was still alive when Lal left. (ER 101, 148-150).

**(c) Lal's representation by appointed counsel Smith.**

**[1] The first motion for appointment of new counsel**

On January 14, 1992, Lal first moved to appoint new counsel due to a breakdown of the attorney-client relationship. (RT 1- 14-92 p. 9). Lal said that appointed counsel Laurance Smith had not filed a discovery motion despite Lal's requests, and had not had bloodstains

on clothes claimed to be Lal's tested. (ER 97).

Smith replied that he had not filed a discovery motion because it might induce the government to file a "counter-discovery motion".[2] Smith then took the unusual step of disclosing purported client confidences by informing the court that Lal "had told both myself and my investigator a couple of fairly diametrical [sic] opposed stories at various times of what was supposed to have happened in this case." This made it "quite difficult to investigate facts and prepare a defense." Smith said he hadn't had the blood tested because he wasn't sure which of the two stories Lal was going to settle on. (RT 1-14-92 p12-p14.) Smith also told the court:

> "I have declined requests which I construe to be requests for information that would allow [Lal] to prepare a story or defense.... [I don't want him to ] make up the facts after getting the information from me." (ER 97-98).

The court denied Lal's motion for appointment of new counsel (ER 98).

**[2] Counsel's *ex parte* conference with the presiding judge outside of Lal's presence.**

On April 30, 1992, Smith had an *ex-parte* chambers conference with Judge Lewis, the presiding criminal judge of the Sacramento Superior Court. (CT 297-305). Lal was not present or told about the conference.

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[2] Under state procedures, any discovery by the prosecution is limited to (a) names and addresses of witnesses the defense intends to call at trial (b) any written or recorded statements of these witnesses (c) reports by experts, and (d) any physical evidence that the defense intends to offer at trial. California Penal Code section 1054.3.

Smith told Judge Lewis said that on April 29, 1992, he, his investigator, and a witness, Beatrice Alva, had spoken by telephone. Smith said that Alva told him that she took up "undercover" residence in Phoenix, Arizona because of "threats". The investigator had found Alva, but Smith did not think the prosecutor knew her address. Alva told Smith that her son, Alex Bruno, had told her that Lal had telephoned him, had made statements that Bruno thought were threats, and had told Bruno that Lal knew Alva had moved to Arizona (ER 94-95). Smith said that he had tried to contact Bruno but had not been successful (Supplemental ER 300). Based on the telephone call, Smith believed he was in:

> "an ethical dilemma that is created by my having received what I believe to be evidence of commission of a felony by my client a conflict ... between my duty to my client and my obligation as an officer of the court, and I have asked for this hearing ...to preserve the record, regarding this situation.
>
> Miss Alva obviously suspects that Azhar Lal may have gotten the information concerning her whereabouts from us, because where else would I have gotten it.
>
> This creates the possibility that I as defense counsel could be suspected myself of a criminal offense of giving her, or giving him that information, which is not the case, but which in any event creates another potentially serious conflict of interest."

(Supplemental ER 300-301). Smith also told Judge Lewis:

> "Under Proposition 115, I believe it's an independent offense to disclose the whereabouts of witnesses to a defendant.
>
> The conflict would be that ... my defense to that accusation

would necessarily consist of privileged information between myself and possibly a former client, which definitely does create a conflict."

(Supplemental ER 302).

Judge Lewis told Smith that he was "not up on attorney ethics" and emphasized his "absolute vast ignorance of the attorney canons of ethics", but said there was no conflict. Smith, said the judge, had no duty to report the commission of a crime by his client or take any other action because of the telephone call. (Supplemental Excerpts of record, 301-303). Judge Lewis then asked Smith, if his further investigation showed that there was a conflict, would he be asking to be relieved as counsel? Smith replied:

"Yes. If there's a sufficient conflict, I have no choice, and we obviously are going to pursue this and see how much of the information can be verified. If there is strong verification, then I'll probably be back."

**[3] Counsel's letter to the prosecutor disclosing the location of witness Alva.**

Smith did not consult with Judge Lewis further. There is no evidence that he ever talked to Bruno or in any other way tried to verify what he said Alva had told him. However, the next day, May 1, 1992, Smith wrote a letter to the prosecutor stating:

"This will confirm our telephone conversation at approximately 8:50 this morning. I have reason to believe that Beatrice Alva, a witness in the above referenced case, wishes to contact you. She may not know how to do so. As known to me, Alva is residing in Pheonix [sic], Arizona. Her telephone number is (602) 841-2866. She is also sometimes reachable at

(602) 841-5558" (ER 141).

Smith did not discuss the letter with Judge Lewis or inform the judge that he had sent it. He did not tell Lal about his *ex parte* conference with Judge Lewis or his letter to the prosecutor. (ER-96, 98.)

**[4] The second motion for appointment of new counsel**

On June 10, 1992, Lal moved again for new counsel. Lal said that he and Smith could not agree on whether or not Lal was going to take the stand and on the defense Smith would present (ER 98.) Lal said Smith had not given him copies of witness statements or let Lal listen to tapes of witness interviews. Because of this, Lal could not decide whether to testify"because there is no way I can take the stand where I don't have everybody's statements, what everybody has said. ... I am blind. I am just perfectly blind in this courtroom" (ER 98.)

Smith again took the unusual step of purporting to confess Lal's guilt, saying that Lal wanted to "completely deny responsibility for the stabbing" rather than admit responsibility and argue that the evidence established a lesser crime than first-degree murder (ER 98-99.) Smith complained of "a long history of obstructionism [a]nd non-cooperation with me on Mr. Lal's part" and complained that Lal did not trust him despite his effort to do "ever everything that I can to overcome that distrust." (ER 98.) Smith also briefly referred to the letter to the district attorney.

When asked by the court whether he had told Lal what the witnesses had said, Smith replied, "Yes. The matters have been summarized for him. Frankly, it has been a little bit difficult to do that, because of the backgrounds of death threats and so forth: I have to be very careful what I tell him." (Lal interrupted at this point to deny that he had threatened anyone). (ER 99.).

The court found no conflict or breakdown in the attorney client relationship. (ER 100.)

**[5] In camera hearings during trial.**

On June 17, 1992 during an argument outside the jury's presence about admission of the alleged threatening telephone call, Smith disclosed that he had sent the letter to the prosecutor about Alva. (ER 96, 249.)

On June 24, 1992, at an in camera hearing, Lal told the court that he did not want to testify that he had killed Arons during a homosexual encounter, a defense Smith had suggested. (ER 102.) Lal did not testify.

**[6] Counsel raises the "homosexual encounter" theory during closing argument.**

On June 26, 1992, during closing argument, Smith argued to the jury that Lal had stabbed Arons without an intent to kill during a homosexual encounter (ER 102.) There was no evidence in the record supporting such a theory other than the unclothed state of the body when found. Lal desperately interrupted and moved for a mistrial and for appointment of new counsel. (ER 100.) The court denied the motion (ER 100.) Several minutes later, after a further objection by Lal to Smith's closing argument, the court ordered Lal in camera to stop objecting. (ER 100.)

**[7] The motion for new trial**

Following the guilty verdicts, Lal's family retained new counsel to prepare and argue a motion for a new trial based upon the breakdown of the relationship between Lal and Smith.(ER 100, 108.) Lal's supporting declaration stated:

1. Lal had asked trial counsel about clothes found with blood on them. His attorney told him that he was not going to get the bloodstains analyzed because if he did so, Lal might change his story.

2. Lal never told trial counsel two different versions of what had happened. "What actually happened was that I told Mr. Smith ***this*** is what happened, and he constantly told me, no, ***this*** is what probably happened. He [Smith] continued to support his version from then on."

3. Lal denied intimidating any witnesses, saying that "If Beatrice Alva said she received a telephone call from her son, Alex Bruno, saying that I had made a threatening call to Bruno, she was not telling the truth. I never threatened Bruno and he did not testify that I had done so at trial." The only action he took involving witnesses was to help trial counsel find them.

4. Lal was not aware that trial counsel and his investigator met with Judge Lewis on May 30, 1992 until his new attorney told Lal about it. Trial counsel met with Lal on May 30, 1992, but did not discuss his telephone call with Alva. He said merely that he felt some of the witnesses may have been threatened.

5. Lal said that he did not take the stand in his defense because his attorney had not provided him with the taped interviews of the key witnesses, and Lal did not know what the witnesses were going to say or what theory trial counsel was going to use.

6. Lal denied that he had killed the victim during a sexual encounter. (Exhibit "A" to petition for rehearing).

The prosecution's response included a declaration by Smith in

which Smith declined to respond or comment directly "concerning the nature or content of communications between myself and Mr. Lal", but offered the following justification for his trial strategy:

> a fingerprint on a cigarette found on the floor of the kitchen conclusively proved that Lal had been present when the victim was "stabbed."[3]
>
> Since Lal would not testify at trial, and since there was no physical evidence that a third party was present, trial counsel concluded that Lal must have stabbed the victim.
>
> The condition of the body [unclothed] suggested that sexual activity had occurred.
>
> He was forced to argue that the killing had occurred during a "sexual encounter" because Lal would not take the stand. (Exhibit "B" to petition for rehearing).

The court denied the motion for new trial without holding an evidentiary hearing or requiring that Smith testify as a witness and be subject to cross examination.

**[8] Smith's later declaration and letter.**

On August 12, 1993, Smith sent a letter to Lal's counsel referring to his telephone call with Alva as follows:

"Much like an attorney whose client brings in a murder

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[3]Smith's explanation was false. The evidence showed that the cigarette was found in the ***laundry room***, not the kitchen where the murder occurred! See discussion below. (There was no evidence of bloodstains on the cigarette or anything else connecting the cigarette with the stabbing.)

weapon and plunks it on the desk, I concluded that I had a duty not to suppress evidence. Suppressing incriminating evidence is one of the quickest and best ways I know for an attorney to end up in the dock next to his former client."

On March 22, 1994, Smith provided Lal's new counsel with a declaration explaining the conference outside of Lal's presence and his letter to the prosecutor. Smith stated:

"This conversation [with Alva] led me to believe two things: (1) Lal may have committed a felony, i.e., intimidation of a witness in violation of Penal Code section 136, and (2) Lal may have created a situation which might lead me to be suspected of aiding a abetting him in such intimidation. In the latter event, I would be unable to defend against any accusation without revealing confidential material. In all events, I was concerned that I had received information possibly indicating the commission of a felony which I may have been under a duty to report to law enforcement."

Smith declared that that Judge Lewis had "declined to relieve me as counsel for Lal", although there was no record that Smith had asked to be relieved. Smith then said that he "resolved the conflict" by sending the letter to the district attorney.

**(2) Evidence presented at the trial**

**(a) Circumstances of the murder.**

The victim's body was found unclothed. The victim died from a wound to his neck. Additional superficial injuries suggested that the victim had tried to fight off his assailant. (ER 109.) The victim's rings, watch, and about $200 were missing. (ER 110).

### (b) Lal's whereabouts at the time of the murder.

At about 1:00 a.m. on June 10, 1988, Lal asked Beatrice Alva for a ride to his "cousin's" house. (ER 110- 111.) Alva drove Lal to the victim's house at Lal's direction. Lal then went toward the back of the house, saying that he would be a few minutes. (ER 111.) Alva waited for half an hour and then went to the front door, knocked, and rang. No one responded. (ER 111.) Alva could see a light coming from the kitchen, but could not see or hear anything. (ER 111.)

Alva drove back home without Lal. At about 4:30 to 5:00 a.m., Lal arrived. He had a long, deep cut on his forearm, two similar cuts on his leg, and his clothes were bloody.(ER 112.)

Alva's daughter Florrie Bruno gave Lal a ride home. Lal was wearing a pair of tennis shoes that belonged to her. Lal changed his clothes, took off the shoes and wrapped them in the bloody clothing. On the way, they stopped at an apartment complex. Lal put the clothing in a dumpster and went to one of the apartments. While Lal was gone, Florrie went to the dumpster and retrieved her shoes.

### (c) Crime scene evidence

Various blood splatters recovered from the crime scene showed the presence of type O+1 blood, the victim's blood type. One of Florrie's tennis shoes showed the presence of type A blood, Lal's blood type. The other had traces of type O+1. (RT 1019.) Type O+1 occurs in about 8% of the population. (ER 113 114.) There was no evidence on how old the traces of blood on the shoes were.

Investigators found Lal's fingerprints on (a) a dresser in the victim's bedroom, (b) the door frame between the hallway and dining room, and (c) on a cigarette in the ***laundry room*** (ER 114.) None were found in the kitchen, where the murder occurred.

### (d) Testimony about Lal's alleged theft.

Florrie Bruno told the police that several weeks before the murder, Lal later showed her three guns that he said he had taken from the old man's house where he worked. He gave Florrie one of the guns, a .22 caliber handgun. After the murder, Florrie and Lal's brother took the gun to a park and gave it to an unknown "black man". The victim's son testified that he had noticed the guns missing about three weeks before the murder (ER 114-115.)

### (e) Alva's testimony about Lal's alleged call to her son.

Alva testified that about six to eight weeks before trial, her son Alex told her that Lal had told him Lal knew "exactly" where Alva was living in Phoenix. Alva testified that only an "undercover investigator" knew her address then. (ER 115.)

## ARGUMENT

### 1. The Supreme Court should grant certiorari because of the importance of the issues in this case.

This petition involves issues of substantial importance. At issue is the interpretation of the major exception to the strict conflict of interest prohibition in *Nix v. Whiteside,* 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986). *Nix v. Whiteside* was a fairly narrow decision based on a fully developed record involving a defendant's unequivocal statement to his attorney that he intended to testify falsely at trial. The Ninth Circuit applied the exception to excuse gross conflicts and breaches of loyalty to a case where no evidentiary hearing had ever been held on the issue and where the major item of alleged client misconduct was a past act not involving falsely testifying at trial. This case also involves the degree to which defense counsel can conduct court proceedings affecting his client's interest

without the client being present or even being informed that the proceeding had occurred, addressed by this Court in *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). Because the issues involved go well beyond the particular petitioner's concerns, certiorari is appropriate.

**2. Smith's May 30, 1992 conference with Judge Lewis outside of Lal's presence denied Lal due process of law.**

In *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987), this court reaffirmed the rule that due process guarantees a defendant the right to be personally present at any hearing in which his presence has a substantial relationship to his ability to defend himself against the charges. This Court held due process did not require defendant's presence at a competency hearing of two prosecution witnesses where none of their proposed substantive testimony was discussed, holding "there is no indication that respondent 'could have done [anything] had [he] been at the [hearing] nor would [he] have gained anything by attending.'" *Kentucky v. Stincer*, 482 U.S. at 747, quoting *United States v. Gagnon*, 470 U.S. 522, 527, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). This Court emphasized that the result could have been different if substantive testimony had been discussed.

In *Campbell v. Rice*, 302 F.3d 892 (9th Cir. 2002) ("*Campbell II*"), the Ninth Circuit applied *Stincer* to an in-chambers conference at which the prosecutor had informed the court that defense counsel was being prosecuted for felony possession of drugs. The trial judge had found no conflict of interest but had not investigated further or informed defendant of the conference. *Campbell II* at 892. The Ninth Circuit held:

> "Campbell's due process rights were violated when he was excluded from the in-chambers hearing in which defense

counsel, the prosecutor, and the judge discussed the conflict of interest raised by the felony prosecution of defense counsel by the same district attorney's office that was prosecuting Campbell. As the Supreme Court has held, if defense counsel's representation is hampered by a conflict of interest, the integrity of the adversary system is cast into doubt because counsel cannot "play[ ] the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Given that the right to conflict-free counsel must be preserved in order to "ensure that the trial is fair," *id.*, the in-chambers hearing held to determine whether Campbell's right to conflict-free counsel had been violated must have been a critical stage of the criminal proceedings.

It is also clear that Campbell's presence at the in-chambers hearing "would [have] contribute[d] to the fairness of the procedure." *Stincer*, 482 U.S. at 745, 107 S.Ct. 2658. No one was representing Campbell's interests at this critical hearing, during which the trial judge considered whether defense counsel McCann could zealously defend Campbell against the same district attorney's office that was prosecuting her. If Campbell had been present at this conference, or had the trial court appointed another attorney to represent Campbell during this conference, Campbell or his appointed counsel could have asked questions to more fully flush out the nature of McCann's conflict. Because Campbell was never informed of the conflict, Campbell could neither assert his objections to McCann's continued representation or waive his right to conflict-free counsel. Accordingly, we conclude that Campbell's due process right to be present at the conference was violated."

*Campbell II* at pp. 898-899. The Ninth Circuit also found that

defendant's exclusion from the in-chambers hearing was a "structural error" because defendant would have been able to "influence the process" in a significant way had he been present at the hearing. *Campbell II* at 899, citing *Hegler v. Borg*, 50 F.3d 1472, 1476 (9th Cir.1995).

> "Had Campbell been informed of McCann's potential conflict, and were he or a court-appointed representative present at the in-chambers hearing, Campbell or his representative could have asked the judge to expand his inquiry into the potential conflict. Just as the denial of the assistance of counsel affects the integrity of an entire trial, Campbell's exclusion from this critical in-chambers hearing at which his counsel's potential conflict of interest was evaluated 'affect[ed] the trial from beginning to end.'"

*Campbell II* at 899-900, quoting *Rice v. Wood*, 77 F.3d 1138, 1141 (9th Cir.1996) (*en banc*). As a structural error, defendant's exclusion was subject to a rule of automatic reversal. *Id.*

*Campbell II* is a correct application of *Stincer*, and in this case, it is even clearer that petitioner should have been present at counsel Smith's April 30, 1992 chambers conference with Judge Lewis. Petitioner would have told the judge that he had not made a threatening call to Alex Bruno and could have prevented Smith's ill-advised letter to the prosecutor disclosing Alva's location.

**3. The Ninth Circuit erred in deciding that no conflict existed.**

**a. The Ninth Circuit misapplied *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986)**

The Ninth Circuit based its decision that no conflict existed on *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123

(1986). In *Nix v. Whiteside*, defendant was charged with murder arising out of his stabbing of a victim. Defendant had consistently told his attorney up until shortly before trial that, although he had not actually seen a gun in the victim's hand when he stabbed the victim, he was convinced that the victim had a gun. However, during preparation for direct examination shortly before trial, respondent for the first time told counsel that he had seen "something metallic" in the victim's hand. When asked about this, respondent said: "If I don't say I saw a gun, I'm dead." On respondent's insisting that he would testify that he saw "something metallic," counsel told him that if he testified falsely, it would be counsel's duty to advise the court that he felt respondent was committing perjury, and that counsel probably would be called as a witness to impeach that testimony and would seek to withdraw from representation if respondent insisted on committing perjury. Respondent ultimately testified as originally contemplated, admitting on cross-examination that he had not actually seen a gun in the victim's hand. Respondent later claimed that his attorney, by so advising respondent, had been in a conflict of interest. This Court disagreed, holding that defense counsel's duty of loyalty was limited to "legitimate, lawful conduct" and that counsel could not "assist the client in presenting false evidence." *Nix v. Whiteside,* 475 U.S. at 166.

However, it is clear from this Court's opinion that this Court rendered its decision only after the state courts had conducted a full inquiry into the facts of the case, including holding an evidentiary hearing at which trial counsel testified, and after both parties had agreed to rely on the record made in the state court proceedings. All courts concerned had based their decision on the trial court's factual finding that defendant would have testified falsely had his attorney not warned him that he would have to advise the court that defendant was committing perjury if he persisted in his plan to testify that he had seen a gun in the victim's hand.

"The trial court held a hearing, heard testimony by (defendant) Whiteside and (defense attorney) Robinson, and made specific findings that the facts were as related by Robinson."

*Nix v. Whiteside*, 475 U.S. at 162.

"At an evidentiary hearing on the motion [for new trial], Whiteside testified that he had told Robinson at their first meeting that he had seen a weapon in Love's hand. Some weeks later, Robinson informed Whiteside that the weapon could not be found and, according to Whiteside, told him to say only that he thought he had seen a gun, rather than that he in fact had seen one. Whiteside 'got the impression at one time that maybe if I didn't go along with - with what was happening, that it was no gun being involved, maybe that he will pull out of my trial.' App. to Pet. for Cert. A70.

Robinson's testimony contradicted Whiteside's. According to Robinson, Whiteside did not initially claim to have seen a gun, but rather claimed only that he was convinced Love had had one. Roughly a week before the trial, however, in the course of reviewing Whiteside's testimony, Whiteside "made reference to seeing something 'metallic' . . . . I don't think he ever did say a gun." *id.*, at A85:

'And at the end Donna asked him about that, because that was the first time it had ever been mentioned either to her or to myself. His response to that was, "in Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead." I explained to him at that time that it was not necessary that the gun be physically present for self-defense, one; two, that to say that would be perjury on his part because he had

> never at any time indicated that there was a gun . . .; three, that we could not allow him to do that . . .; four, I advised him that if he did do that it would be my duty to advise the Court of what he was doing . . .; also, that I probably would be allowed to attempt to impeach that particular testimony. I told him that there was no need for him to lie about what had happened, that he had a good and valid defense on the facts as he had related them to us, and we felt we could present a good self-defense case on the facts he had stated to us." *Ibid.*

*Nix v. Whiteside*, 475 U.S. 157, 179-180 (concurring opinion).

> "The parties agreed to rest on the record made in the state-court proceedings. Chief Judge Stuart held that the trial judge's factual finding that Whiteside would have committed perjury had he testified at trial actually to having seen a gun was fairly supported by the record."

*Nix v. Whiteside*, 475 U.S. at 180 (concurring opinion).

> "Respondent has never [claimed] that the fact-finding procedure employed by Iowa in considering new trial motions in any sense deprived him of a full and fair hearing or failed to provide a sufficient basis for denying his motion."

*Nix v. Whiteside*, 475 U.S. 183.

This Court also made it clear that it was not deciding that trial counsel could testify against his client or divulge confidential information ***while still serving as counsel***:

> "Robinson divulged no client communications until he was compelled to do so in response to Whiteside's post-trial challenge to the quality of his performance.... The Court of Appeals also determined that Robinson's efforts to persuade Whiteside to testify truthfully constituted an impermissible threat to testify against his own client. We find no support for a threat to testify against Whiteside ***while he was acting as counsel***. The record reflects testimony by Robinson that he had admonished Whiteside that ***if he withdrew*** he 'probably would be allowed to attempt to impeach that particular testimony,' if Whiteside testified falsely."

*Nix v. Whiteside*, 475 U.S. at 172, 173, fn 7, emphasis added.

In contrast, no evidentiary hearing was ever held in this case. The Ninth Circuit perverted *Nix v. Whiteside* to eliminate counsel Smith's duty of loyalty and petitioner's right to conflict-free counsel simply because Smith ***believed*** or ***alleged*** that petitioner might act illegally or testify falsely. The panel simply accepted Smith's bare allegations as if they had been fully investigated and proven.

The Ninth Circuit could not determine that the case fell within the exception in *Nix v. Whiteside* absent a full record. Accordingly, this court should grant certiorari and direct the Ninth Circuit to remand for an evidentiary hearing

**b. The Sacramento Superior Court failed to conduct any inquiry in response to counsel Smith's disclosure that he believed he was in a conflict.**

The right to effective assistance of counsel includes "a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). This right "is among those 'constitutional rights so basic to a

fair trial that their infraction can never be treated as harmless error.'" *Holloway v. Arkansas*, 435 U.S. 475, 489, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); accord, *Cuyler v. Sullivan*, 446 U.S. 335, 349,100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

To safeguard the right, this Court has imposed a duty on trial courts to investigate the existence of any potential conflict as soon as it knows, or reasonably should know, that defense counsel may be in conflict. *Wood v. Georgia*, 450 U.S. at p. 272. If the trial court fails to conduct the inquiry, reversal is mandated. *Cuyler v. Sullivan*, 446 U.S. at 348, *Wood v. Georgia*, 450 U.S. 261, 273 n. 18, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). Indeed, a"***possibility*** of a conflict of interest" triggers the court's duty to inquire further. *Wood v. Georgia*, 450 U.S. at 272.

The trial court must not simply inquire, but also act in response to what its inquiry discovers. *Holloway v. Arkansas*, 435 U.S. at 484. In discharging its duty, the court must act "... with a caution increasing in degree as the offenses dealt with increase in gravity." *Glasser v. United States*, 315 U.S. 60, 71, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

The trial court's inquiry into the possible conflict of a defense counsel will be inadequate unless the court advises the defendant of the possible conflict. *Campbell v. Rice*, 265 F.3d 878, 888 (9th Cir. 2001) ("*Campbell 1*"), citing *Holloway v. Arkansas*, 435 U.S. at 483 n. 5, (in which this Court held that a potentially conflicted attorney may continue providing representation only if defendant knowingly waives the right to an attorney "unhindered by a conflict of interests"). A defendant who does not know of a potential conflict can neither object or waive his right to conflict-free counsel. *Id.* Thus, any "inquiry" that does not include notifying the defendant of the potential conflict is inadequate and subject to the automatic reversal rule of *Holloway v. Arkansas*. *Id.*

On April 30, 1992, Judge Lewis first learned that counsel Smith might be in a conflict of interest when Smith told the judge, outside petitioner's presence that, because of the telephone call with prosecution witness Alva, he believed that Lal had unlawfully threatened a witness.[4] He was in "a conflict ... between my duty to my client and my obligation as an officer of the court" (Supplemental ER 300), and also stated: "I as defense counsel could be suspected myself of a criminal offense of giving her, or giving him that information, which is not the case, but which in any event creates another potentially serious conflict of interest." provided Alva's address to Lal and his duty to Lal. (Supplemental ER 301).

Judge Lewis failed to adequately inquire into the possible conflict because he did not notify petitioner about his conference with Smith. Indeed, Judge Lewis made virtually no inquiry into the conflict at all, but tried to resolve it on his own. Although warning Smith that he, Judge Lewis, had an "absolute vast ignorance of the attorney canons of ethics", Judge Lewis simply reassured Smith that he was not in a conflict of interest.

Judge Lewis' opinion was no substitute for the required inquiry. The potential for a conflict of interest is not measured by the representations of the prosecutor, but by the unique perspective and subjective beliefs of defense counsel. *Holloway v. Arkansas*, 435 U.S. at 485, *Campbell 1*, 265 F.3d at 886. Smith's subjective belief raised at least a potential conflict that triggered the court's duty of inquiry.

*Nix v. Whiteside* cannot be an exception to the duty to inquire, since the court in *Nix* was not aware of any potential conflict until after the trial.

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[4] Unlike the situation in *Nix v. Whiteside*, this disclosure involved an allegation of past misconduct, not future misconduct.

**c. Trial counsel Smith was in a gross conflict of interest.**

From the time of the first motion for appointment of new counsel, Smith demonstrated that he was in, not simply a potential, but a gross conflict of interest with petitioner so as to violate Lal's 5th, 6th, and 14th amendment rights. The conflict was between Smith's duty of loyalty to Lal and his personal self-interest. Smith feared that he might be held responsible for alleged threats directed at prosecution witnesses. Yet he was unwilling to simply declare a conflict of interest and be relieved as Lal's counsel, apparently because this would mean forgoing the fee paid by the court to an appointed counsel.

Lal first asked the court to appoint new counsel on January 14, 1992. Smith response was extraordinary, to represent himself as someone who should be retained by the court to control Lal. Smith purported to disclose confidential client communications to the court, telling the court Lal had told him contradictory versions of his actions and might make up a story if not controlled. Such a statement, of course, strongly suggested that Lal had confessed his "guilt" to Smith, but now wished to deny it. That Smith would go to such extremes simply to remain as Lal's court-appointed counsel showed, even then, that he there was a severe conflict between Smith's self-interest and his duty of loyalty to Lal.

Smith himself acknowledged that he was in a conflict of interest when he met secretly with Judge Lewis on April 30, 1992. He initially described it as a conflict between his duty of loyalty and his supposed duty to disclose alleged past misconduct by Lal, but was much more concerned that he might be blamed for providing Alva's address to Lal. He said he had asked for the conference, in part, to "preserve the record" (that he was not to blame) and explicitly stated twice that he had a conflict between his duty to Lal and his desire not to be "suspected" of a crime.

And whatever the situation before Smith's call to the district attorney, after he made the call, Smith had an actual conflict of interest with Lal. Smith's action in becoming a secret informant against his own client constituted an undeniable breach of his duty of loyalty, "the most basic of counsel's duties." *Strickland v. Washington*, 466 U.S. at p. 692. By disclosing Alva's whereabouts without first having been relieved as counsel, Smith both "actively represented conflicting interests" and allowed his performance to be "adversely affected" by "an actual conflict of interest." *Id.* No competent attorney acting on behalf of a client in a criminal case in accordance with his constitutional duties to effectively represent his client and "at every peril to himself or herself to preserve the secrets of his or her client" would (1) disclose to the prosecutor the whereabouts of a critical prosecution witness who had left the state and who was making allegations of witness intimidation by his client, and (2) suggest to the prosecutor that the witness might want to speak with him for the purpose of allowing the prosecutor to investigate the allegations.

After such a communication with the prosecutor, no reasonable attorney should have continued to represent Lal. Smith should have declared a conflict and withdrawn. Yet he continued to represent Lal, without telling Lal what he had done.

The conflict between Lal and Smith evident in the January hearing had developed into a full-blown breakdown of their relationship by the time of the hearing on Lal's motion to appoint new counsel held during jury selection on June 10, 1992. Lal complained that Smith would not let him review tape-recorded interviews of important witnesses. Lal said he was unable to decide whether to testify "because there is no way I can take the stand where I don't have everybody's statements, what everybody has said." In response, Smith took the incredible step of purporting to confess his own client's guilt. He informed the court that Lal wanted

to "completely deny responsibility for the stabbing" rather than admit responsibility and argue that the evidence established a lesser crime than first-degree murder, and said that in his opinion, Lal's position was not tenable, given the evidence which Smith knew to exist in the case. Such a statement would have suggested to the court that Lal had confessed his guilt to Smith. But there was never any evidence that Lal had done so, and indeed Lal later denied it in his declaration.

The conflict culminated in a scene resembling Al Pacino's closing argument in the film "And Justice For All", in which Smith confessed his own client's "guilt" over Lal's strenuous objections. But, unlike Pacino's client in the movie, Lal had not "confessed" his guilt to Smith, and there was almost no evidence to support Smith's theory.

Counsel finds it difficult to believe that this honorable Court would have reached the same result in *Nix v. Whiteside* if, instead of confronting defendant, in confidence, with his duty to tell the truth, the defense attorney had, without telling the court or defendant, (a) secretly informed the prosecutor that his client was planning to testify falsely, (b) remained on the case as defense counsel, and (c) finally argued to the jury that defendant's actions were not an attempt at "self-defense", but an outburst of defendant's "homosexual rage", a possibility that the defendant had never mentioned to his attorney.

Oddly enough, the district court remarked that "if Lal had early-on presented criticisms such that counsel would not permit him to testify to certain facts, or that a fundamental difference in trial strategy was at the core of a near complete breakdown in communication, the trial court would have had no choice but to appoint new counsel." (F&R 40). The district court's opinion that trial convenience would trump such a fundamental conflict is not

the law. The conflict had become clear at the June 10, 1992 hearing on Lal's motion for appointment of new counsel. At that time, jury selection had begun, but no witness had yet testified. And, of course, the Sacramento Superior Court itself had its own duty to conduct an inquiry, especially after Smith had his secret meeting with Judge Lewis on April 30, 1992.

**4. Lal was denied his right to "legal assistance of his own choosing", a condition of his extradition.**

Lal was brought before the Sacramento Superior Court for trial under an extradition treaty. As an extradited person, his position was considerably different than that of an alien already within the court's jurisdiction. As this Court held in *United States v. Rauscher*, 119 U.S. 407 at 412, 7 S.Ct. 234 at 236, 30 L.Ed. 425 (1886), "in the absence of an extradition treaty there is no general obligation of nations to surrender persons sought by another nation." The result is that the acquiring court's jurisdiction is subject to any conditions contained in the treaty. *Id.; Factor v. Laubenheimer*, 290 U.S. 276, 287, 54 S.Ct. 913, 935 78 L.Ed. 315 (1933).

*United States v. Rauscher* adopted the "principle of specialty", holding that a defendant who has come before the court by operation of an extradition treaty "shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up." This Court has consistently followed *Rauscher. Factor v. Laubenheimer, Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 11, 57 S.Ct. 100, 102-03, 81 L.Ed. 5 (1936), cf. *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992).

When Lal was extradited, extraditions between England and the United States of America were governed by the Extradition Treaty signed on 8 June 1972 and various supplements. Under established

law, the English High Court had the power to prevent extradition if the Secretary's decision to extradite was "tainted with illegality, irrationality, or procedural impropriety." Affidavit of Philip Sapsford, Q. C. (ER 156-157).[5]

The Extradition Treaty between the United States and England is subject to the provisions of other treaties, even if the United States is not a signatory. In *Soering v. United Kingdom* (1989) 11 E.H.R.R. 439, the European Court on Human Rights held that Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (CHR), to which England is a signatory, would bar British authorities from extraditing a defendant if, at trial, defendant would be subjected to capital punishment, holding that a decision by a Convention signatory to extradite a fugitive is subject to the provisions of the CHR.

Article 6(3)(c) of the CHR and Article 14(3)(d) of the International Covenant on Civil and Political Rights (1966) (ICCPR), a treaty to which England was also a signatory, both contain provisions providing that a person charged with a crime shall have a right to "counsel of his own choosing." Mr. Sapsford's expert declaration explained that this provision is intended to permit a defendant counsel of his choice if that is "reasonably practicable", and that, had the British authorities been aware that Lal would be denied counsel of his choosing at the time of his extradition, based on *Soering*, they would not have permitted Lal's extradition until the American authorities gave assurances that Lal would be accorded this right. (ER 168)

However, when he arrived in Sacramento, Lal was initially assigned an attorney from Sacramento County Public Defender's

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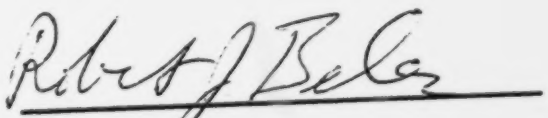
[5] The district court accepted Sapsford as an expert witness

Office, and then assigned Smith after that office withdrew due to a conflict. Lal made three motions for appointment of new counsel. It surely would have been reasonably practicable to appoint new counsel, at least in response to the first motion.

## CONCLUSION

For the above reasons, this honorable Court should grant certiorari in this case.

Dated: Oakland, California, Thursday, March 6, 2003.



**Robert J. Beles**
Attorney for *Petitioner* AZHAR LAL

APPENDIX 1

FILED
DEC 11 2002
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| AZHAR LAL,<br><br>*Petitioner-Appellant,*<br>vs.<br><br>ERNEST ROE, Warden,<br><br>*Respondent-Appellee* | No. 01-16701<br>DC No. CIV-97-1459 LKK<br><br>MEMORANDUM* |

Before: BALDOCK,* KLEINFELD, and RAWLINSON, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Kleinfeld and Rawlinson have voted to deny the petition for rehearing en banc, and Judge Baldock has recommended the same.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc are DENIED.

* The Honorable Bobby R. Baldock, Senior United States Court of Appeals Judge for the Tenth Circuit, sitting by designation.

APPENDIX 2

FILED
OCT 18 2002
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| AZHAR LAL,<br><br>*Petitioner-Appellant,*<br>vs.<br><br>ERNEST ROE, Warden,<br><br>*Respondent-Appellee* | No. 01-16701<br>DC No. CIV-97-1459 LKK<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, Senior Judge, Presiding

Argued and Submitted October 7, 2002
San Francisco, California

Before: BALDOCK,** KLEINFELD and RAWLINSON, Circuit Judges.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.
** The Honorable Bobby R. Baldock, Senior United States Circuit Judge for the United States Court of Appeals for the Tenth Circuit, sitting by designation.

Lal appeals the denial of his habeas petition. We reject all of his arguments and affirm. The reliance on the International Covenant of Civil and Political Rights is misplaced because the relevant portion confers no privately enforceable right. [1] The extradition treaty contains no right to counsel of choice. Lal's arguments about counsel's disloyalty, purported conflict of interest, and the need for a conflict hearing are foreclosed by Nix v. Whiteside. [2] Under Nix, there was no potential conflict to notify Lal of. Lal's disagreements with trial counsel over strategy cannot be the basis of an ineffective assistance claim. [3] We will not fault trial counsel for the choice of defense to present. It is not error to choose one weak defense strategy over another. [4] Lal was not entitled to an evidentiary hearing because the case could be decided on the state court record. [5] Finally, we note that the evidence of guilt was overwhelming and thus the alleged errors could not have prejudiced Lal.

AFFIRMED.

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[1] See, eg Hain v. Gibson 287 F.3d 1224 (10th Cir. 2002).

[2] 475 U.S. 157 (1986).

[3] Guam v. Santos, 741 F.2d 1167,1169 (9th Cir. 1984); Wildman v. Johnson, 261 F.3d 832, 839 (9th Cir. 2001).

[4] Hendricks v. Calderon, 70 F.3d 1032, 1042 (9th Cir. 1995).

[5] Totten v. Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998).

APPENDIX 3

FILED
MAR 22 2001
CLERK, US. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

AZHAR LAL, No. CIV-97-1459 LKK GGH P

*Petitioner,* AMENDED ORDER

vs.

ERNEST ROE, Warden,

*Respondent*

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Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b) (1) (B) and Local General Order No. 262.

On December 8, 1999, the magistrate filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections were to be filed within twenty days. Neither party has filed objections to the findings

and recommendations. [6]

The court has reviewed the file and finds that the findings and recommendation to be supported by the record and the magistrate judge's analysis with the sole exception of the magistrate judge's intimation that the appropriate standard of review of a state court decision may be de novo.

Section 2254 (d) as amended in 1996[7] sets forth the standard of review to be applied by federal courts to state court decisions. Under that standard, "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless the adjudication of the claim [1] . . . resulted in an decision that was contrary to or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United Stites . . . ." 28 U.S.C. § 2254(d)(1).

With respect to the "contrary to clearly established Federal law" standard contained in § 2254 (d) (1) , the Supreme Court has said that an adjudication results in a decision contrary to clearly established Supreme Court law if the state court reaches a result different from applicable Supreme Court authority, on indistinguishable facts. See *Williams v. Taylor*, 529 U.S. 362, 120 S . Ct. 14 95, 1519 (2000) ; *Torres v. Prunty*, 223 F. 3d 1103, 1107

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[6] On January 28, 2000, petitioner filed untimely objections to the magistrate judge's findings and recommendations and they therefore will be disregarded.

[7] 2 Because this action was filed after April 26, 1996, the provisions of the Antiterrorism and Effective Death Penalty Act of 1596 (AEDPA") are applicable. See Lindh v. Murphy, 521 U.S. 320, 336 (1997) ; Calderon v. United States Dist. Ct. (Beeler) , 128 F.3d 1283, 1287 (9th Cir. 1997) , cert.. denied, 522 U.S. 1099 (1998) .

(9th Cir. 2000) .

With respect to the "unreasonable application of clearly established Federal law" standard also contained in § 2254(d)(1), the Court has explained that an adjudication results in a decision involving an unreasonable application of clearly established Supreme Court law if the state court applies clearly established Supreme Ccurt law to facts distinguishable from those of the applicable Supreme Court authorities and reaches a result that is not merely incorrect but also unreasonable. See *Williams* 120 S.Ct. at 1521; *Torres*, 223 F.3d at 1107. The "unreasonable application" standard is objective in nature and "does not require that all reasonable jurists would agree that the determination was unreasonable." *Torres*, 223 F.3d at 1107 (citing *Williams*, U.S. 120 S. Ct. at 1521-22).

In light of the Supreme Court's teachings in Williams and the purposes of the 1996 amendments to § 2254, the Ninth Circuit has concluded that the "unreasonable application" standard is equivalent to the "clearly erroneous" standard applied by the Circuit to factual determinations made by district courts. *Torres*, 223 F.3d at 1107-08; *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. ) , cert. denied, __ U.S. __, 121 S. Ct. 340 (2000) Under such a standard, the district court may grant habeas corpus relief only if left with "a 'firm conviction'" that the determination made by the state court was wrong and that the determination urged by, the habeas corpus petitioner is correct. *Torres*, 223 F.3d at 1107-08; Van Tran, 212 F.3d at 1153-54. This standard of unreasonableness is also applicable to a court' s determination under § 2254(d)(2) of whether a state court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Torres*, 223 F.3d at 1107-08.

Nonetheless, the magistrate judge's recommendation stands no matter which standard is applied for the reasons stated in the.

findings and recommendations.

Accordingly, the court hereby makes the following ORDERS:

1. The findings and recommendations filed December 8, 1999, are ADOPTED IN FULL except is noted above; and

2. Petitioner's application for a writ of habeas corpus is DENIED. IT IS SO ORDERED.

DATED: March 21, 2001.

LAWRENCE K KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT JUDGE

APPENDIX 4

FILED
MAR 16 2001
CLERK, US. DISTRICT COURT EASTERN
DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

AZHAR LAL, No. CIV-97-1459 LKK GGH P

*Petitioner,* ORDER

vs.

ERNEST ROE, Warden,

*Respondent*

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Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. §2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b) (1) (B) and Local General Order No. 262.

On March 3, 2000, the magistrate filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections were to be filed within twenty days. Neither party has filed objections to the findings and recommendations. The court has reviewed the file and finds that the findings and recommendation to be supported by the record

and the magistrate judge's analysis with the sole exception of the magistrate judge's intimation that the appropriate standard of review of a state court decision may be de novo. Section 2254 (d) as amended in 1996[1] sets forth the standard of review to be applied by federal courts to state court decisions. Under that standard, "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless the adjudication of the claim (1] . . . resulted in an decision that was contrary to or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States . . . ." 28 U.S.C. § 2254(d)(1).

With respect to the "contrary to clearly established Federal law" standard contained in § 2254 (d) (1) , the Supreme Court has said that an adjudication results in a decision contrary to clearly established Supreme Court law if the state court reaches a result different from applicable Supreme Court authority, on indistinguishable facts. See *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 1519 12000); *Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

With respect to the "unreasonable application of clearly established Federal law" standard also contained in § 2254 (d) (1) the Court has explained that an adjudication results in a decision involving an unreasonable application of clearly established Supreme Court law if the state court applies clearly established Supreme Court law to facts distinguishable from those of the applicable Supreme Court authorities and reaches a result that is not merely incorrect but also

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[1] Because this action was filed after April 26, 1996, the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") are applicable. See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Calderon v. United States Dist. Ct (Beeler), 128 F.3d 1283, 1287 (9th Cir. 1997), cert. denied, 52Y U.S. 1099 (1998)

unreasonable. See *Williams* 120 S. Ct. at 1321; *Torres*, 223 F.3d at 1107. The "unreasonable application" standard is objective in nature and "does not require that all reasonable jurists would agree that the determination was unreasonable." *Torres*, 223 F.3d at 1107 (citing *Williams*, U.S. 120 S. Ct. at 1521-22). In light of the Supreme Court' s teachings in Williams and the purposes of the 1996 amendments to § 2254, the Ninth Circuit has concluded that the "unreasonable application" standard is equivalent to the "clearly erroneous" standard applied by the Circuit to factual determinations made by district courts. Torres, 223 F.3d at 1107-08; Van Tran v. Lindsey, 212 F.3d 1143, 1153-54 (9th Cir): , cert. denied, __ U.S. 121 S. Ct. 340 (2000). Under such a standard, the district court may grant habeas corpus relief only if left with "a 'firm conviction'" that the determination made by the state court was wrong and that the determination urged by the habeas corpus petitioner is correct. *Torres*, 223 F.3d at 1107 O8; 212 F-3d at 1153-54. This standard of unreasonableness is also applicable to a court' s determination under § 2254(d)(2) of whether a state court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Torres, 223 F.3d at 1107-08.

Nonetheless, the magistrate judge's recommendation stands no matter which standard is applied for the reasons stated in the findings and recommendations.

Accordingly, the court hereby makes the following ORDERS:
1. The findings and recommendations filed December 8, 1999, are ADOPTED IN FULL except as noted above; and
2. Petitioner's application for a writ of habeas corpus is DENIED.
IT IS SO ORDERED. DATED: March 15 2001.

LAWRENCE K. KARLTON
SENIOR JUDGE

UNITED STATES DISTRICT COURT

APPENDIX 5

FILED
DEC 8 1999
CLERK, US. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

AZHAR LAL,

*Petitioner,*

vs.

ERNEST ROE, Warden,

*Respondent*

No. CIV-97-1459 LKK GGH P

FINDINGS AND
RECOMMENDATIONS

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1. Introduction

Petitioner is a state prisoner proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was convicted of the first degree-felony murder of Harold Arons, an elderly man for whom petitioner had previously done yard work.

During the early morning hours of June 10, 1988, petitioner arrived at the home of Beatrice Alva. Petitioner asked for a ride to his cousin's house, saying that he wanted to collect money owed to him. Alva, Cheri Richey and Ramona Soto drove petitioner to what

turned out to be Arons' house. When petitioner failed to return from the house after 20 minutes, they rang the doorbell and knocked on the door. After receiving no response, they returned to Alva's house.

At approximately 4:30 a,m., petitioner again appeared at Alva's house, this time wearing bloody clothes. He asked for a ride to his uncles house which Alva's daughter, Florie Bruno, agreed to provide. Before leaving, petitioner changed out of his bloody clothes. On the way, they stopped at an apartment complex where petitioner threw his bloody clothes into a dumpster. A pair of tennis shoes, ostensibly worn by petitioner, was found in a dumpster having blood consistent with both the petitioner and the victim.

Sometime later, petitioner fled to England. Harold Arons was later found dead. Missing were his two rings, Rolex watch and money clip containing money.

Petitioner challenges his conviction on the following grounds 1) denial of right to conflict-free counsel; 2) ineffective assistance of counsel; 3) improper denial of motion for substitute counsel. After carefully reviewing the record, the court recommends that the petition be denied.

II. Procedural Background

The application for writ of habeas corpus was filed on August 7, 1997. Petitioner requested an evidentiary hearing, but because this case was subject to the newly enacted AntiTerrorism and Effective Death Penalty Act (AEDPA), the right to an evidentiary hearing was far from clear. On November 9, 1998, the court issued its order denying an evidentiary hearing, in part without prejudice, relying partially, on the more restrictive provisions of AEDPA which governed the court's review of state court determinations on mixed

issues of law and fact. The court invited petitioner's counsel to reapply for an evidentiary hearing if further investigation revealed facts outside the record concerning evidence which petitioner believed was important to the habeas issues. No review was sought from this order. No such reapplication was made, ostensibly because no new facts had been discovered.

Because of the fluid state of AEDPA law with respect to deference owed to state courts [1], the undersigned has updated his previous analysis. However, in light of the opinion by the Honorable Lawrence K. Karlton in Greene v. Henry, CIV-S-97-563 LKK GGH P, and because the instant case is ultimately a Judge Karlton case in this court, the undersigned has deferred to the Greene opinion. Although an updated AEDPA discussion is set forth, a de novo review of the state court decisions will be employed. Although the result is closer than it would have been had deference been given to the state court determinations of the mixed questions of law and fact, the undersigned ultimately does not change his opinion that an evidentiary hearing was properly denied.

III. AEDPA

The AEDPA applies to this petition for habeas corpus which was filed after the AEDPA became effective. *Neelley v Nagle*, 13 F.3d 17 (11th It Cir. 199 ) citing *Lindh v. Murphy*, 521 U.S. 320, 117 S. Ct. 2059 (1997). The AEDPA "worked substantial changes to the law of habeas corpus," establishing more deferential standards of review to be used by a federal habeas court in assessing a state court's adjudication of a criminal defendant's claims of constitutional error. *Moore v. Calderon*, 108 F.3d 261, 263 (9th Cir. 1997), Most important to this case are the changes to 28 U.S.C. § 2254(d) which

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[1] See e.g., *Wilson v. Henry*, 185 F.3d 986, 988 (9th Cir. 1999).

now read:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States, or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

The difficulty is in determining, consistent with Congress' intent, the proper mode of analysis to be applied -in evaluating a claim under §2254(d). Recently, the Ninth Circuit addressed this issue in *Davis v. Kramer*, 167 F.3d 494, opinion amended March 10, 1999 (9th Cir. 1999). In Davis, the Ninth Circuit observed that the terms "contrary to" and "unreasonable application of" "reflect the same general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court. Moreover, as some other circuits have correctly pointed out. the statutory terms are not amendable to a rigid distinction, see *O'Brien v. Dubois*. 145 F.3d 16, 22 (1st Cir. 1998), and have 'overlapping meanings,' *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998)." at 500. The court further explained.

> The terms, read together, delineate the range of cases that warrant federal habeas relief under § 2254(d)(1).

> The terms overlap, and cases may fall into one or both classifications, depending on the circumstances. No purpose would be served by attempting to establish a fixed division or to give meaning to one that would exclude the other. Their purpose is the same: to ensure the objective that state courts follow controlling Supreme Court law. [footnote omitted.] For our purposes here, we need state only that a state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision. Id. at 500. In footnote 8 the *Davis* court explained that its definition of "unreasonable application" was not intended to be exhaustive:

Rather, it sets forth certain circumstances in which a state court's determination amounts to an "unreasonable application." There are, of course, other circumstances comprehended by the term we construe, If, for example, a state court applies a Supreme Court precedent in a context where such application is unreasonable, the decision would amount to an unreasonable application. So too would a state court decision that, in applying federal law, simply misinterprets the relevant Supreme Court precedent. See, e.g., *Green*, 143 F.3d at 870. Id. at 500 n. 8. In *Davis*, the Ninth Circuit also indicated that it was not adopting a "pure law vs. mixed question" approach: In a footnote in *Moore v. Calderon*, 108 F.3d 261, 265 n. 3 (9th Cir. 1997), we stated in dicta that the "contrary to" test applies to questions of law, while the ., unreasonable application" test applies to mixed questions of law and fact. While this is certainly true in some instances, in the Moor footnote we did not attempt a complete definition of these statutory terms, or set

forth an inflexible rule. Nor do we here. We leave the terms with the full flexibility and potential for interchange with which we found them. Id. at 500 n. 7.

In *Davis* the Ninth Circuit did not describe the standard to be applied in determining whether a state court decision involved an unreasonable application of federal law. However, the Ninth Circuit indicated that if the state court had "failed to apply" the appropriate precedent, no AEDPA deference would be due. Furthermore, if the state court had "misinterpreted" the controlling precedent, no AEDPA deference could be shown by the federal courts, as would be the case if the application of precedent was simply "unreasonable." *Davis* did not precisely state under what standard de novo federal review or deference to state decisions) a federal court would determine whether a state court had "failed to apply," or "misinterpreted," or "unreasonably interpreted" established precedent, but the *Davis* court itself conducted a de novo review.

More recently, the Ninth Circuit deter determined that state court legal, or mixed factual/legal, decisions could not be overturned unless contrary to, or involved an unreasonable application of, "an authoritative decision of the Supreme Court." *Furman v. Wood*, 190 F.3d 1002, 1004 (9th Cir. 1999) (emphasis in the original). Nevertheless, when AEDPA is applied, neither court has given direction in determining whether "unreasonable application" standards are to be always reviewed de novo, or with much higher deference. [2]

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[2] Take, for example, a claim involving ineffective assistance of counsel. There is no question that the law governing such claim is clearly established, Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), but such "resolution" begs the issue of the application of that clearly established law to a particular fact pattern-an application that a state court decision on the mixed question of law and fact would have already performed. The real AEDPA question in most cases is-what amount of deference is to be afforded the application of law to fact.

In the past, the undersigned has applied the standard used by the First, Fifth, Seventh, and Eleventh Circuits, and most recently the Sixth and Fourth Circuits as well. See *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996); *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), revsd. on other grounds, 117 S. Ct. 2059 (1997); *O'Brien v. Dubois* 145 F.3d 16, 25 (1st Cir. 1998), and *Neely*, supra.[3] In defining this standard, the Fifth Circuit held that "an application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state co court ruling was incorrect." *Drinkard*, 97 F.3d at 769. The standards applied by the First and Seventh Circuits are similar. See *Lindh v. Murphy* 96 F.3d at 870; *O'Brien v. DuBois*, 145 F.3d at 25.

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[3] Recently, the Sixth Circuit held that it was adopting the Drinkard standard. Nevers v. Killinger 169 F.3d 352, 361-62 (6th Cir. 1999):

Since we heard oral argument in this case this Court. in Herbert v. Billy, 160 F.3d 1131, 1998 WL 801319 (6th Cir. Nov.20, 1998), has stated its agreement with the "reasonable jurist" approach taken by the Fifth Circuit in Drinkard. 97 F.3d at 769. Today we state as well our agreement with the standard enunciated by the First Circuit, namely, that "for the writ to issue, the state court decision must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." O'Brien, 145 F.3d at 25; accord Hall, 106 F.3d at 748-49 ("The statutory 'unreasonableness' standard allows the state court's conclusion to stand if it is one of several equally plausible outcomes."). We recognize that the First Circuit specifically rejected Drinkard's "reasonable jurist" test when articulating its own standard, O'Brien 145 F.3d at 25 7. We think, however, that the two are not mutually exclusive; rather, both standards can be employed to aid in arriving at the correct answer to the question of "unreasonableness." The deference to the state courts' judgments required by the AEDPA is achieved by adopting the rule that the unreasonableness of a state court's application of clearly established Supreme Court precedent will not be "debatable among reasonable jurists," Drinkard, 97 F.3d at 769, if it is "so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes," O'Brien,. 145 F.3d at 25.

The Fourth Circuit in Green, which the Ninth Circuit cites in Davis, adopted the Drinkard standard. See Green, 143 F.3d at 870, 873.

In *Davis,* the Ninth Circuit did not adopt the standard for "unreasonable application" as defined by the First, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits. Rather, the Ninth Circuit stated there were several circumstances where a state court's determination amounts to "unreasonable application." Apparently the Ninth Circuit has adopted a more subjective, less deferential approach that is similar, if not identical, to the pre-AEDPA standard, i.e., denovo review. See also the post-*Davis* decision of the trial judge in this matter, *Greene v. Henry* CIV-S-97-563) LKK GGH P, Order of February 10, 1999, in which Honorable Lawrence K. Karlton* applied a de novo standard of review to a mixed question of fact and law. Given the district judge's opinion in this case, and the ambiguities in the Ninth Circuit *Davis* analysis, the undersigned feels constrained to follow *Greene*. Accordingly, this court will apply a de novo standard in its consideration of the instant action.

Before the California Court of Appeal petitioner raised three claims: 1) denial of right to conflict free counsel; 2) trial court error in denying his *Marsden* motions; and 3) denial of right to self representation.[4] The appellate court issued a reasoned opinion denying all three claims. Respondent's Answer, exhibit A. In his petition for review, petitioner raised all three of these claims. Respondent's Answer, exhibit B. The California Supreme Court denied the petition without comment or citation. Respondent's Answer, Exhibit C. In a habeas corpus petition filed in the California Supreme Court, petitioner again argued that he was denied his right to conflict free counsel and that the trial court erred in denying his *Marsden* motion. Petitioner also argued that counsel was ineffective for failing to present a viable defense. Respondent's Answer, exhibit D. The California Supreme Court denied the petition without comment or citation. Respondent's Answer, exhibit E.

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[4] In the instant action, petitioner does not argue that he was denied his right to self-representation.

Two of petitioner*s claims were addressed in a reasoned state court petition. In an initial opinion, the Ninth Circuit held that claims not addressed in a reasoned state court opinion were entitled to no deference, and the federal court should decide the issue de novo. *Delgado v. Lewis*, 168 F.3d 1148 (9th Cir. 1999). However, that opinion was vacated on rehearing, and the panel issued a revised rule for claims not addressed in a written decision-the federal court should "independently" assess the state court decision in light of the AEDPA standard-whether the correct Supreme Court law was applied, and whether the application was unreasonable in the clearly established federal law. *Delgado v Lewis* 1999 WL 415523 light of the Lewis, F. F.3d (9th Cir. June 23, 1999). On September 27, 1999, the Supreme Court stayed *Delgado* pending the disposition of the petition for a writ of certiorari. *Lewis v. Delgado*, No. 99-451, 1999 WL 731741 (U.S. Sep. 27, 1999). [5]

Because this court will apply a de novo standard of review in evaluating petitioner's claims, it need not consider whether petitioner's ineffective assistance of counsel claim, for which there is no reasoned state court decision, is subject to a different standard of AEDPA review than the other two claims.

IV. Background

The court will begin by summarizing the testimony of the prosecution's witnesses.

A. Prosecution

Dr. Anthony

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[5] On October 8, 1999, the Supreme Court denied the motion for reconsideration of the stay order. Lewis v. Delgado, No. 99-451, 1999 WL 801361 (Oct. 8, 1999).

Dr. Anthony performed an autopsy on the victim, Harold Arons, who was in his 70's when he died. RT at 122, 140. Arons had stab wounds on the right and left side of his neck. RT at 125. He also had two cutting-type wounds on his hands. RT at 126. Arons had a number of bruises on his body. RT at 126. The stab wounds to the neck were the cause of death. RT at 1314.

Beatrice Alva

On June 9 and 10, 1988, Alva lived at 7462 Winkley Way in Sacramento County. RT at 158. During the early morning hours of June 10, 1988, Alva was home with Ramona Goto, Cheri Richey, Alex Bruno, Jr. (Alva's son) and Jacqueline Tagawa. RT at 158-159. At around 1:30 a.m. petitioner came to Alva's house. RT at 159. Petitioner asked for a ride to his cousin's house, and Alva, Ramona and Cheri drove him there in Alex Bruno's car. RT at 160.

Petitioner told them that he needed to collect money owed to him. RT at 161. Petitioner told them that he would give Bruno $20 for the ride. RT at 162.

When they arrived at Helen Way, they pulled up in front of a house. RT at 163. Petitioner told them to drive around the comer and park on the side of the house. RT at 163. Petitioner got out of the car, walked toward the back of the house and jumped the gate. RT at 166. Before leaving, petitioner told them that he would be back in a few minutes. RT at 167. After 20 minutes went by, Alva backed up the car and pulled across the street from the house. RT at 170. They waited there for 10 or 15 minutes. RT at 172. Then, Alva pulled in front of the house. RT at 172. Ramona and Cheri then knocked on the door and got no answer. RT at 172. When they returned to the car, Alva decided to go up to the door herself. RT at 173. Alva and Ramona then went up to the front door and knocked and rang the bell. RT at 174. The curtains on one of the front windows were

open about one foot. RT at 174. Alva could see a light coming from the kitchen area, but saw no people. RT at 174.

Alva then returned to the car and drove home, RT at 18 1. Cheri Richey went home and Ramona Goto remained at Alva's home. RT at 183, At approximately 4:30 a.m. Alva heard a knock at the door. RT at 184. It was petitioner. RT at 184. Petitioner was barefoot, and wearing a pair of pants and shirt that he had not worn earlier. RT at 185. He also had a long cut on his left forearm. RT at 185. Petitioner showed them two cuts on his upper right leg. RT at 186. Petitioner told them that he received the cuts when he caught on barbed wire as he jumped over a fence on his way to Alva's. RT at 208. However, he did tell them that he had been in a fight with his cousin. RT at 217.

Petitioner told them that he had gotten into a fight with the man (his cousin) who owed him money. RT at 188-89. Alva's daughter arrived around 5:30 a.m. and gave petitioner a ride home. RT at 190. Alva's daughter also loaned petitioner a pair of her shoes. RT at 188.

When Alva saw petitioner at 4:30 a.m., he had no possessions that he did not have earlier. RT at 204. Petitioner had no watches or rings. RT at 204.

Carroll Gene Jarrett

Jarrett was a close friend of Harold Among. RT at 229. Among. owned a bar called the Pall Mall Club. RT at 229. Among. worked from 7:30 a.m. to 2:30 p.m. at the bar. RT at 2' 1. Jarrett drove Among. to and from work. RT at 2' ) I . On June 9, 19 8 8, Jarrett saw that Among. had five or six twenty dollar bills in his money clip. RT at 234-35. When he drove Among. home on June 9, 1988, Among. was wearing two diamond rings and gold Rolex watch. RT

at 238.

On June 10, 19 8 8, Jarrett went to Among. house to pick him up. RT at 240-4 1.

When Among. did not come out, Jarrett knocked on the door but got no response. RT at 24 1. Jarrett then went over to the home of Among. son, Homer Among. who lived nearby. RT at 243. Homer returned to the he house and unlocked the door. RT at 244. They found Among. lying in front of the stove in the kitchen. RT at 244. Among. was nude with his pants approximately 18 inches to two feet below his feet. RT at 245. Among. money clip, watch and jewelry were missing. RT at 246.

Doreen Among.

Doreen Among. was Among. daughter. She last saw Among. on June 8, 1988, at the funeral of Among. twin brother. RT at 327. At that time, he was wearing two rings and a Rolex watch. RT at 327. Among. hired petitioner to be his gardener through Mo's Maintenance in October 1986. RT at 329. Petitioner worked as his gardener until May 1988. RT at 330.

Her father kept his watch on the dresser in his bedroom. RT at 355. He kept his other jewelry in a jewelry box in the middle bedroom. RT at 355. On June 10, 1988, after her father's death, she looked in the jewelry box and it was empty. RT at 3 5 5.

Pearl Dreyfuss

Pearl Dreyfuss was Among's girlfriend. RT at 341. She had known him for 14 years. RT at 341. Normally, Among. wore two rings and a large silver watch. RT at 342.

Officer Cooper, Officer Yager, Joseph Avila, Robert Springer

Officer Cooper is a Sacramento Police Officer. RT at 379. He helped to investigate the crime scene, which he described in his testimony. Officer Yager also investigated the crime scene. RT at 460.

Joe Avila is a supervising identification technician with the Sacramento Police Department. RT at 470. He testified that two Marlboro brand cigarette butts were found at the scene. RT at 473. Also found was the filter portion of a Merit brand cigarette. RT at 473.

Robert Springer is a supervising identification technician with the Sacramento Police Department. RT at 486. He testified that petitioner's fingerprint was found on Arons' dresser. RT at 493-94. Petitioner's fingerprint was also found on the wrapper of a Marlboro cigarette. RT at 50' Petitioner's palm print was also found on a doorjamb in Arons' house. RT at 507.

Mohammad Lal

Mohammad Lal is petitioner's father. RT at 516. At the time of the murder, petitioner lived with his father. RT at 517. He denied putting petitioner on a plane to England shortly after the murder. RT at 518-19. Rather. he testified that after June 9, 1988, petitioner just never came home. RT at 519. Mohammad Saleem Mohammad Saleem used to live with petitioners uncle, Mohammad Matloob. RT at 522. At approximately 2:00 a.m. on June 10, 1988, petitioner and a girl arrived at Matloob's home. RT at 523-24.

Fumiko Tateyama

Fumiko Tateyama was Arons' house cleaner. RT at 538. Part of her

housecleaning duties included dusting the dresser in Arons' bedroom. RT at 541. She did the cleaning four hours every other week. RT at 543. She could not remember whether she had cleaned the week of Arons' death or the week before, RT at 545.

Ramona Goto

Goto testified that on the early morning of June 10, 1988, she was at the home of Beatrice Alva. RT at 554. Also there were Alex Bruno, his girlfriend Jackie and Cheri Richey. RT at 555. That morning, petitioner came to the door and asked for a ride. RT at 556. Petitioner said that he wanted to collect money that someone owed him. RT at 557. She thought he said that his cousin owed him money. RT at 557.

Alva, Richey and Goto gave petitioner a ride. RT at 558. When they got to the house, petitioner got out of the car and they waited for 20 minutes. RT at 560. Then, Goto and Richey knocked on the door and rang the doorbell. RT at 560. After receiving no response, they returned to the car. RT at 561. Then Alva went up and knocked on the door and rang the bell. RT at 561-62. After receiving no response, she got in the car and they drove back to her house. RT at 562. When Goto was knocking on the door, she looked through a front window. RT at 562, All she saw was a small light coming from inside the house. RT at 562. When they returned, Goto went to bed. RT at 563.

On cross-examination, Goto testified that when petitioner first arrived at Goto's house he was very drunk. RT at 564.

Alex Bruno

On June 10, 1988, Bruno was staying at the home of his mother, Beatrice Alva. RT at 646-47. On June 10, 1988, at approximately

4:30 a.m. Bruno was sleeping at his mother's home. RT at 648. Bruno denied seeing petitioner at his home at that time. RT at 649. He also denied ever telling his girlfriend, Jackie Tagawa, that petitioner had blood on him at that time. RT at 649.

Bruno testified that he could not remember receiving a telephone call from Petitioner approximately six to eight weeks before the' trial. RT at 649. He could not remember receiving this call after his girlfriend told him that petitioner had called earlier. RT at 649. He could not remember whether petitioner told him during the conversation that he knew that his mother was living in Phoenix, that he knew where his sister was, and that he wanted all of them to take the Fifth if called to testify. RT at 650.

Bruno could not remember receiving a telephone call from his mother, and telling her that petitioner knew where she lived, and where her daughter, Cheri Richey and Ramona Goto were. RTat 650-51. He could not remember expressing concern about this phone call. RT at 65 651.

Jackie Tagawa

Jackie Tagawa, Bruno's girlfriend, testified that on June 19, 1988, she was at the home of Beatrice Alva. RT at 660. Also present were Ramona Goto, Cheri Richey and Bruno. RT at 660. At approximately 12:00 a.m. on June 19, 1988, she went to sleep on the living room floor with Bruno. RT at 660. She did not remember Alva asking to borrow Bruno's car at around 1:00 a.m. RT at 660. She also did not remember waking up at 5:00 a.m. and seeing petitioner there. RT at 661. A few days after June 10, 1988, Bruno told Tagawa that he had seen petitioner on June 10, 1988, and he had blood on him. RT at 662.

Six to eight weeks prior to trial, she received a telephone call from

petitioner asking for Bruno. RT at 663. When she told petitioner that Bruno was not there, he said he would call back. RT at 663. After Bruno returned, petitioner called again. RT at 664. Tagawa answered the telephone, then handed it to Bruno. RT at 664. After the first phone call from petitioner, Tagawa called Beatrice Alva in Arizona. RT at 665. Tagawa told Alva that petitioner had called asking for Bruno. RT at 665.

After the second call, Bruno told Tagawa that petitioner had said that he knew where Alva and her daughter were. RT at 666. Petitioner told Bruno that he knew that Alva was in Phoenix, Arizona. RT at 669. Bruno did not tell her that petitioner said that he knew where Richey and Goto were or that thev should take the Fifth. RT at 667.

Beatrice Alva

Alva testified that six to eight weeks before trial, she received a telephone call from Jackie Nakagawa. RT at 673. Nakagawa. told Alva that petitioner knew where she was, and that she would have to ask Bruno regarding what was said during the phone conversation. RT at 673. An hour or so later, Alva called Bruno. RT at . Bruno to told her that petitioner said that he knew where Ramona Goto was incarcerated and what her release date was. RT at 674. Bruno also told her that petitioner said he knew that Alva's daughter, Florentina Bruno, was back in custody. RT at 674. According to Bruno, petitioner said that they should plead the Fifth. RT at 676. Bruno said that petitioner did not know where Richey was. RT at 677. Bruno also told her that petitioner knew that she was living in Phoenix, Arizona. RT at 679.

CarlosAcosta

Carlos Acosta is a licensed vocational nurse. RT at 733. Acosta drew

blood from petitioner. RT at 733-34.

Mazar Lal

Mazar Lal is petitioner's brother. RT at 789. He did not remember taking his brother to the airport the week following June 10, 1988. RT at 790. He also did not remember having a conversation with Alva regarding his father packing a suitcase for petitioner and then placing him on an airplane for England. RT at 790. At the time of the murder, petitioner smoked Newport cigarettes, but he sometimes smoked Marlboros that he got from Mazar when he ran out. RT at 79 1.

During August 1988, Mazar flew to England with petitioner's wife and children. RT at 792. While in England, Mazar got married. RT at 794. Mazar and his family (including Petitioner) are British subjects. RT at 795.

Florentina Bruno

Bruno testified that she could not remember talking with police officers on June 14, 1988. RT at 892. She did not remember telling Officer Provenchar on June 14, 1988, that when she saw petitioner talking to her brother on June 10, 1988, at 4:00 a.m. she noticed that petitioner had a fresh cut on his left arm and blood on his clothing. RT at 893.

Bruno also did not remember telling Officer Provenchar that on June 10, 1988, she asked petitioner what happened and he told her that he had been jumped by several subjects. RT at 894. She also did not remember telling the officer that she noticed that petitioner was wearing a pair of her shoes. RT at 894. She did not remember telling the officer that she saw petitioner roll up bloody clothes and put her shoes inside of them. RT at 894.

She did not remember that when she drove petitioner to his uncle' s house, he first asked that they stop at the Twin Pines apartments on Meadowview Road. RT at 895. She did not remember telling the officer that when they stopped at the apartments, petitioner put his bloody clothing and her shoes in a dumpster. RT at 895.

She did not remember telling the officer that when they arrived at petitioner's uncle's house, there were three East Indian men there. RT at 896. She did not remember telling the officer that petitioner told her about getting out of the States and that he had called an uncle in Stockton. RT at 896.

Bruno denied telling the officer that two or three weeks earlier petitioner and someone named Jimmy had borrowed her nylons and gone to an unknown residence near Freeport Boulevard and robbed an old man that petitioner mowed lawns for. RT at 898. She denied telling the officer that after that, petitioner returned and showed her a .2 5 caliber handgun and a rifle he said he had gotten during the robbery of the same man. RT at 898-99.

She did not remember telling the prosecutor and his investigator that petitioner gave her the handgun he had obtained during the robbery, RT at 904. She did not remember saying that after the murder, she was concerned because she still had the gun. RT at 904. She did not remember saying that after the murder she told petitioner's brother that she still had the gun and she wanted to get rid of it. RT at 904. She did not remember saying that she and Petitioner's brother, Mazar, got rid of the gun by giving it to someone in a park. RT at 905.

She did not remember that on June 14, 1988, she gave police officers the pair of shoes that petitioner threw in the dumpster that she retrieved. RT at 906.

Detective Provenchar

Detective Provenchar testified that on June 14, 1988, he interviewed Florie Bruno regarding the murder. RT at 936. She told him that on June 10, 1988, she went to Alva's house at 4 or 5 in the morning. RT at 936. In addition to Alva, Alex Bruno and petitioner were there. RT at 936. Petitioner had a fresh cut on his arm and his clothing was covered in blood. RT at 936-37. She noticed that petitioner was wearing a pair of her tennis shoes. RT at 937. Petitioner put on fresh clothes, then wrapped his bloody clothes with the tennis shoes inside. RT at 937. She gave petitioner a ride to his uncle's house. RT at 938. On the way there, they stopped at the Twin Pines Apartments, RT at 938. Petitioner then threw the bloody clothes and shoes into a dumpster and went into an unknown apartment. RT at 938. While he was in the apartment, she retrieved her shoes from the dumpster. RT at 9' 938 8.

When they arrived at the uncle's house, she stayed long enough to use the restroom. RT at 938. As she was leaving, she saw petitioner's father walking up the stairs to the apartment. RT at 938. While she was with petitioner, he talked about going to Mexico. RT at 939.

She told the officer that two or three weeks prior to the interview, she loaned petitioner and a man named Jimmy some nylons so they could rob an old man. RT at 940. During the robbery they took a.25 caliber handgun and a.22 caliber rifle. RT at 940. Petitioner showed one of the guns to her. RT at 940. She did not tell the officer that she ever possessed the small gun and that she and Mazar Lal disposed of it in a park. RT at 943.

Richard Clark

Richard Clark is a Deputy District Attorney for Sacramento County. RT at 945. He testified that he interviewed Florie Bruno on June 6,

1992. RT at 945. Bruno told him that she gave petitioner a ride on the morning of June 10, 1988. RT at 948. She also said that petitioner had bloody clothes on which he changed out of before they left Alva's house. RT at 949. On the way to his uncle's house, they stopped at an apartment complex where petitioner put the bloody clothes and shoes in a dumpster. RT at 950. While he was in an apartment, Bruno retrieved the shoes from the dumpster. RT at 950.

She also told Clark that petitioner and a man named Jimmy borrowed a pair of pantyhose because they wanted to rob an old man whose lawn petitioner mowed. RT at 95 1. Petitioner and Jimmy stole three guns from the old man. RT at 951. Petitioner gave her a handgun. RT at 95 1. After the murder, she and petitioner's brother, Mazar, gave it to a man in a park. RT at 952.

Richard Gunn

Richard Gunn is an Investigator with the Sacramento District Attorney's office. RT at 960. He interviewed Bruno on June 10, 1992. RT at 961. She told him that petitioner gave her a gun which she later disposed of RT at 961

Les Murphy

Les Murphy is a detective with the Sacramento Police Department. RT at 976. He searched Arons' home after the murder. RT at 976. He found no jewelry or Rolex watch during the search. RT at 977. He also found no money or weapons. RT at 977.

On June 14, 1988, Murphy went to the Meadowview Apartments. RT at 978. Upon arrival, a female Hispanic in her late twenties gave him a brown bag shopping bag containing a pair of men's tennis shoes with possible blood stains. RT at 979. The dumpster was

seized and searched. but no other evidence was found. RT at 980.

Delores Delicate

Delores Delicate is a criminalist with the Sacramento County District Attorney's Forensic Laboratory. RT at 986. Petitioner was blood type A. RT at 1016. Arons was blood type 0. RT at 10 16. Blood found on a right tennis shoe was consistent with that of the victim Arons. RT 1017. [This pair of tennis shoes referenced above.] RT 1059. Blood found on the left tennis shoe was consistent with petitioners blood type. RT at 1019.

Beatrice Alva

Alva testified that during the week immediately following June 10, 1988, she spoke with Mazar Lal regarding petitioner's whereabouts. RT at 1045. He told her that his dad had packed a bag and flown him to London. RT at 1046.

Homer Arons

Homer Arons testified that his father kept firearms in his home. RT at 1047. He kept a .25 handgun, a . 12 gauge shotgun and a .22 rifle. RT at 1048. Two weeks before his father's death, he saw the guns in the house. RT at 1048. The guns were missing after his father's death. RT at 1.049. Harold Arons never toli his son that the guns were missing. RT at 1051.

Detective Thomas Lee

Detective Lee testified that after searching Arons' home he found no weapons. RT at 1058. He also found no money clip with money in it. RT at 1058. He did find ammunition in the form of. 12 gauge shotgun shells and .25 automatic live rounds in the master bedroom.

RT at 1058. There was also a large leather gun case, possibly for a shotgun, and a black leather-like holster. RT at 1058.

Officer Winford

Officer Winford went to London to arrest petitioner. RT at 1064. He observed petitioner smoking Marlboro cigarettes while they were en route from San Francisco to Sacramento. RT at 1066.

B. Defense

Bill Hammersmith

Bill Hammersmith was the defense investigator. RT at 1083. He interviewed Florie Bruno twice-April 12, 1992, and June 8, 1992. RT at 1083. Bruno said that she gave petitioner a ride home at approximately 2:00 a.m. on June 10, 1988. RT at 1084-85. Bruno said that she saw petitioner dispose of some clothes. RT at 1088-89. Bruno never indicated that she had been threatened by petitioner. RT 1089-90. She did not see petitioner in possession of any jewelry or rings. RT at 1090.

Mazar Lal

Three or four days before the murder, Mazar Lal and his brother, petitioner, went to Arons' home to retrieve some of their yard care tools. RT at 1096, 1098. They went inside the house and talked with Arons. RT at 1096. Arons attitude toward both of them was friendly. RT at 1098. Three or four weeks before Arons discontinued the yard care service, Mazar Lal went into his house while he was working for a break. RT at 1100- 110 1. Lal denied telling Detective Lee that he had never been in the residence so his fingerprints should not be inside the house. RT at I 10 1.

Dr. Schaffer

Dr. Schaffer is a physician specializing in psychiatry. RT at 1172. He reviewed the jail psychiatric records of Florie Bruno for four different treatment periods: February 1990, February 199 1, and two contacts in 1992. RT at 1173. He also reviewed a personality test, the MMPI, which was administered on Bruno in April 1990. RT at 1173. He did not personally evaluate Bruno. RT at 1173 1173.

There were several diagnoses in her records including depression with psychotic features. RT at 1174. Also included was a diagnoses related to organic mental disorder and organic hallucinosis. RT at 1174. In addition, she had various substance-abuse diagnoses related to her prior use of drugs. RT at 1174. She also has a medical seizure disorder. RT at 1174.

Mohammad Nazir

In June 1988, Mohammad Nazir lived in an apartment with Mohammad Saleem and Mohammad Matloob. RT at 1212. At around 2:30 a.m., on June 10, 1988, he was awakened by someone knocking on the door. RT at 1214-15. He saw petitioner and a girl in his apartment. RT at 1219. Petitioner did not have any ring's or watches or jewelry with him. RT at 1219-20.

C. Rebuttal

Detective Lee Detective Lee testified that during his interview of Mazar Lal, Lal did not tell them that he had ever been inside Arons' house. RT at 1241.

V. Discussion

A. Conflict Free Counsel

In claim one, petitioner alleges that before trial, his counsel spoke with prosecution witness Alva who had moved to Arizona allegedly because of threats made against her by members of petitioner's family. Alva told petitioner's trial counsel that her son had told her that petitioner had made veiled threats against her and knew she was living in Arizona.

Petitioner's trial counsel brought this matter to the attention of the court because of a potential conflict of interest in that: 1) the witness may have believed that petitioner learned of her whereabouts through counsel; and 2) counsel had received what he believed to be evidence of a felony committed by petitioner (threat to harm Alva). The court told counsel to come back With any further information so that a decision could be made whether appointment of another counsel to represent petitioner was warranted.[6] Petitioner's counsel did not return to the court. Instead, he notified the prosecutor that Alva wanted to speak with him, disclosing that she was in Arizona. Petitioner now argues that his counsel's disclosure to the prosecutor of Alva's whereabouts created an actual conflict of interest that adversely affected counsel's representation Of Petitioner.

Attached to the petition as exhibit C is a declaration by petitioner's trial counsel describing these events. Attached as exhibit D is a copy of the letter sent by petitioner's trial counsel to the prosecution stating that Alva wished to contact him and including two telephone numbers for her. Attached as exhibit E is a copy of a letter dated August 12, 1993, from petitioner's trial counsel to his present counsel. In this letter counsel states, in part,

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[6] The transcript from this hearing is located at CT pp. 297-305.

Much like an attorney whose client brings in a murder weapon and plunks it on the desk, I concluded that I had a duty not to suppress evidence. Suppressing incriminating evidence is one of the quickest and best ways I know for an attorney to end up in the dock next to his former client.

I resolved the conflict between that duty and the attorney-client privilege by advising the district attorney of Beatrice Alva*s address and telephone, which I believed were unknown to him, and indicating Alva may wish to speak to him. Inasmuch as I was planning to call Alva as a witness if the prosecution didn't, I was obligated to disclose her address anyway un

The district attorney was not informed by me that Lal had made threats against Beatrice.

My thinking was that if the district attorney contacted Beatrice Alva, and if Alva wanted to report the death threats to him, she could do so. If that happened, I would not be the source of the information, and I also would not have suppressed any evidence.

For your information, I consulted several of Sacramento's most experienced public and private defense attorneys before settling on this course. I saw the alternative as making a full disclosure to the district attorney and declaring a conflict. That choice could well have been more harmful to Lal than the one I made, and might well have ended up with me being called as a prosecution witness concerning the threats.



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See also. Exhibit C (Declaration of Smith) in which he stated: "This conversation [with Alva's son] led me to believe two things: LAL may have committed a felony, i.e. intimidation of a witness and (2) LAL may have created a situation which might lead me to be suspected of aiding and abetting him in such intimidation.

Petitioner has a right to conflict free representation under the Sixth Amendment. *Garcia v. Bunnell*, 33 F.3d 1193, 1195 (9th Cir. 1994). To establish a Sixth Amendment violation petitioner may show "that an actual conflict of interest adversely affected his lawyer's Performance." Id. at 1198 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708 (1980)) Petitioner must prove conflict, not just a possibility of conflict, "through a factual

showing on the record." *Morris v. California*. 966 F.2d 448, 455 (9th Cir. 1991). Once an actual conflict is shown, petitioner must demonstrate only "that some effect on counsel's handling of particular aspects of the trial was 'likely.'" *United States v. Miskinis*, 966 F-2d 1263, 1268 (9th Cir. 1992)'. Prejudice is presumed. Id. If, however, there is only a possibility of conflict, petitioner must meet the "performance and prejudice" standard of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984).

When Smith's words set forth above are judged strictly on their face, the court understands petitioner's present argument. Smith phrases everything in the past tense, and does not directly assert the fear of a present or future crime being committed. Surely, if interpreted only in this fashion, the court does have some problems with Smith's rationale, He is not under a duty to report past crimes his client may have committed-if this were not so, in the instant case, Smith would have had to report the fact that his client was guilty of murder. Similarly, if Smith is aware of a past crime that his client had committed, he cannot be guilty of "suppressing evidence" simply

because he does not report the past crime to authorities.[7] Thus, if the intimidation of witness Alva is viewed as only a past crime, Smith may well have exacerbated any conflict of interest because he would have committed a breach of his ethical duties to his client by initiating a report of a past crime to the prosecutor.

However, it is not correct to view the witness intimidation as only a past crime in the context of events herein. Witness intimidation has a continuing effect right through the trial in which the witness is to testify. Witness intimidation may cause an otherwise available witness to flee or hide (as it did here). It may cause a witness who finally appears to conveniently forget Pertinent facts. Indeed, there were more than a few witnesses in this case that had developed witness chair amnesia when it came to pertinent facts. Therefore, the reported witness intimidation was a present sense crime, and it presently was working a fraud on the court at the time Smith was informed about it. The issue of counsel's conflict was analyzed by the state Court of Appeal in this context of a present sense crime.

The court's interpretation is further borne out by the words that Smith used when he initially reported his dilemma to the trial judge: "[Petitioner' a] correct statement as to the state [Arizona] that she was living in leads me to believe that this is something which should be taken seriously. According to Beatrice [Alva], she was told by her son that she, Beatrice would not make it to court, which I interpret to be a direct threat on Beatrice's life." CT at 299-301 (emphasis

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[7] Again, Smith could not be found guilty of misprision of a felony for a past crime in that misprision requires affirmative concealment of a crime, and actual knowledge of the fact of the Crime. See United States v. Vasquez-Chen, 978 F.2d 546, 554 (9th Cir. 1992). Also, Smith would not be an accessory-after-the-fact for a past crime in that such requires affirmative acts to aid the principal-after-the-fact with the intent that the principal avoid arrest or conviction for the crime. Cal. Penal Code § 32. Applying this definition to attorneys representing a client in a past I crime would be absurd.

added). Obviously, counsel remained concerned about an imminent threat to the life of Beatrice Alva.

In *Nix v. Whiteside*, 475 U.S. 157, 106 S. Ct. 998 (1986) a defendant on trial for murder told his attorney that he was convinced the victim had a gun, but that he had not seen it. Shortly before he was to testify, however, the defendant announced to his attorney his intention to say that he had seen "something metallic" in the victim's hand. The attorney informed his client that he could not suborn perjury, and that if he persisted in his intention to lie on the stand, he would notify the court and ask to withdraw from the case. Id. at 160-61, 106 S. Ct. at 990 991. In his habeas corpus petition, the petitioner argued that his attorney's threat to notify the court and withdraw from the case deprived him of his right to counsel.

In denying the ineffective assistance of counsel claim the court stated,

> [T]he legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence. This special duty of an attorney to prevent and disclose frauds upon the court derives from the recognition that perjury is as much as crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice. Id. at 168-69, 106 S. Ct. at 995-996.

The Court stated that had the attorney in *Nix* carried out his threats to withdraw and to inform the court of his client's perjury, his

actions would have been perfectly proper. Id. at 169-70,106 S. Ct. at 995-996.

The petitioner in *Nix* also argued that his conviction should be reversed because his counsel had a conflict of interest. The Supreme Court rejected this claim as well:

> In his attempt to evade the prejudice requirement of Strickland, Whiteside relies on cases involving conflicting loyalties of counsel. In *Cuyler v. Sullivan*, 466 U.S. 335, 3 5, 100 S.Ct. 1708 (1980), we held that a defendant could obtain relief without pointing to a specific prejudicial default on the part of his counsel, provided it is established that the attorney was "actively represent[ing] conflicting interests." Id., at 3 50, 100 S.Ct. at 1719. Here, there was a indeed a "conflict," but of quite a different kind; it was one imposed on the attorney by the client* s proposal to commit the crime of fabricating testimony without which, as he put it, "I'm dead." This is not remotely the kind of conflict of interests dealt with in *Cuyler v. Sullivan*. Even in that case we did not suggest that all multiple represent ations necessarily resulted in an active conflict rendering the representation constitutionally infirm. If a "conflict" between a client's proposal and counsel's ethical obligation gives rise to a presumption that counsel's assistance was prejudicially ineffective, every guilty criminal's conviction would be suspect if the defendant had sought to obtain an acquittal by illegal means. Can anyone doubt what practices and problems would be spawned by such a rule and what volumes of litigation it would generate?

Id. at U.S. at 176, 106 S. Ct. at 999.

In the instant case, the California Court of Appeal focused on the present sense of the intimidation and found that petitioner's ethical actions caused no prejudicial conflict:

> Defendant confuses counsel's ethical obligation as an officer of the court with conflict of interest analysis. He correctly notes conflict of interest is broadly defined as " "all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests."' [Citation.]" (*People v. Hardy* (1992) 2 Cal.4th 86, 135.) However, defense counsel had no conflicting loyalty to another client or a third person. Counsel denied providing the witness's address to defendant, and counsel had not been threatened with prosecution pursuant to section 1054.2. Accordingly, at most, there existed a remote possibility of a future potential for a conflict of interest. Counsel's dilemma, which defendant eagerly attempts to portray as self-interest, instead concerned his ethical obligations as an officer of the court. Thus, the issue presented is whether defense counsel, in revealing Alva's address, breached an ethical rule or otherwise acted unreasonably, and if so, whether such action rose to the level of ineffective assistance of counsel.
>
> Outside the jury's presence, defense counsel told the trial court he "reported to the District Attorney that I had received a phone call without disclosing its contents and indicated my knowledge of [Alva's] correct telephone number and address in Phoenix

(Italics added.)

Business and Professions Code section 6068, subdivision (e), requires an attorney "[tlo maintain inviolate the confidence, and at every peril to himself .. to preserve the secrets, of his ... client." An attorney may not counsel or assist a client to commit a crime or fraud, and information exchanged between an attorney and client in furtherance of a crime or fraud is not privileged. (Evid. Code, 9; 956; *Agnew v. Superior Court* (1958) 156 Cal.App.2d 838, 840.) Although "the extent to which the attorney who is simply informed of a client's intention to commit a future crime or fraud may disclose the client's intentions has not been authoritatively decided in California [ b]oth the ABA and the Los Angeles County Bar Association Committee on Legal Ethics permit disclosure of client confidences and secrets respecting future crimes to prevent the client from committing a criminal act which the attorney believes is likely to result in death or serious bodily injury. [Citations.]" (Cal. Criminal Law Procedure and Practice (Cont. Ed. Bar 1986) Ethical Duties, § 18.18, p. 370.)

Defense counsel "interpret[ed defendant's comments to Alva's son] to be a direct threat on Alva's life," which may be disclosed pursuant to both the American Bar Association's and the Los Angeles County Bar Association's ethical rules. (Ibid.) Thus, contrary to defendant's contentions, defense counsel committed no ethical breach in revealing Alva's address to the district attorney. Moreover, defense counsel did not reveal the alleged threats to the

district attorney, but simply provided Alva's address. It would appear defense counsel commendably elected a course of action which protected the interests of both his client and the potential witness to the best of his ability.

Reversal of a conviction on the basis of ineffective assistance of counsel requires defendant to show counsel's representation fell below an objective standard of reasonableness, and to demonstrate a reasonable probability a more favorable determination would have resulted absent counsel's error or omission. *(Strickland v. Washington* (1984) 466 U.S. 668, 687-695 [80 L.Ed.2d 674, 693-698]; *People v. Duncan* (1991) 53 Cal.3d 955, 966; *People v. Ledesma* (1987) 43 Cal.3 3d 17 1, 216-217.)

Defendant has not shown counsel's representation fell below an objective standard of reasonableness. Moreover, defendant cannot demonstrate the prejudice necessary to overturn his conviction. As an initial matter, the prosecution may have already had Alva's address, or might have located her by other means before trial. [Footnote 6.] Assuming the prosecution

> [Footnote 6: At defense counsel's in camera meeting with Judge Lewis, counsel stated Alva's location, "to the best of my knowledge, is not even known to the District Attorney's office." This does not conclusively demonstrate the prosecution did not have this address, nor does it prove

> the prosecution would not have located Alva before trial.]

would not have otherwise located Alva and thus she would not have testified at trial, "' [i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding (People v. Ledesma, supra, 43 Cal.3d at p. 217.) The inquiry is whether, absent counsel's action, there is a reasonable probability the result in defendant's case would have been different. (See Strickland v. Washington, supra, 466 U.S. at p. 694 [80 L.Ed.2d at pp. 697-698].)

Here there is no such probability. The evidence of defendant's guilt was overwhelming. About 1:30 a.m. on June 10, 1988, friends drove him to the victim's residence to "collect some money." Though his friends waited 30 minutes, he never returned. Between 4:30 and 5:00 a.m., defendant returned to Alva's home, wearing bloody clothing. He displayed consciousness of guilt by quickly changing his bloody clothes and attempting to dispose of them in a dumpster at another location. Later that morning, a co-worker and the victim's son discovered the victim on the floor of his blood-splattered kitchen with a fatal stab wound to his neck.

Strong forensic evidence also linked defendant to the murder. Blood found on tennis shoes worn. by defendant was consistent with the victim's. Multiple fingerprint evidence placed defendant at the murder scene. There is no reasonable probability of a different result absent Alva's testimony,

Answer, Exhibit A, pp..8-11 1.

Pursuant to *Nix* and the California Court of Appeal, this court is reluctant to characterize counsel's actions as creating even a potential conflict, Petitioner himself created the conflict by arguably threatening a witness and put his counsel in a difficult situation.

Petitioner might next argue-fine-counsel had a duty to report the present sense crime-but he then should have withdrawn as counsel because he then had a conflict. This is not the invariable rule. Even in *Nix* counsel had not withdrawn, and whatever conflict that existed remained because the defendant was "pressured" into not testifying falsely. Yet the Supreme Court did not order the issuance of the writ. Petitioner's case presents even less of a reason to withdraw. Once Smith decided on his novel, but counseled, procedure to simply put the prosecutor in touch with Alva, he believed that any imminency of the threat to Alva's life would be greatly lessened by Alva's ability to inform the prosecutor of the threats and her need for safety. He had not affirmatively disclosed any "past" crime of his client, but any "present" crime would be averted. At this point, he had no legal conflict whatsoever with his client, and no need to withdraw.

In any event, even if a conflict arose, this court finds that any conflict that existed was potential rather than actual. Therefore, petitioner is required to establish prejudice. Beatrice Alva was a strong witness against petitioner. Her testimony detailed the events of June 10, 1988. In addition, she testified that petitioner had threatened her and her family. However, there was a plethora of other evidence to support petitioner's conviction.

Ramona Goto testified regarding the ride given petitioner to Arons' house, and petitioner's failure to return to the car. Jackie Tagawa testified that Alex Bruno saw petitioner with blood on him during

the early morning hours of June 10, 1988. Through the testimony of both Detective Provenchar and Richard Clark, Florie Bruno described giving petitioner a ride home on June 10, 1988, at approximately 4:00 a.m. She described how he threw away his bloody clothes and talked about going to Mexico. In addition, petitioner's fingerprints were found in Arons' house. The jury surely would have drawn adverse inference from the testimony of petitioner's family and friends, most of whom could not even remember events such as whether they took petitioner to the airport after the murder so that he could get on a plane for England. Last, but not least, petitioner's tennis shoes had the blood of the victim on them, as well as his own blood. This would have been hard to do if petitioner were not present at the murder scene. In a word, even if Alva had not testified, petitioner had a near hopeless evidentiary task in rebutting the prosecution's convincing case that he did in fact commit the murder.

Therefore, petitioner has not established prejudice.

Even under a de novo review, the denial of this claim by the state courts was not an unreasonable application of clearly established federal law. Accordingly, for the reasons discussed above, the court recommends that this claim be denied.

B. Ineffective Assistance of Counsel

Legal Standard

In *Lockhart v. Fretwell*, 113 S. Ct. 838, 506 U.S. 364 (1993), the United States Supreme Court described the standards this court must apply to an ineffective assistance of counsel claim. Previously, the test for demonstrating ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), and this test survives. First, a petitioner must show that, considering

all the circumstances, counsel's performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065. To this end, the petitioner must identify the acts or omissions that are alleged not to have been the result of reasonable professional judgment. Id. at 690, 104 S. Ct. at 2066. The federal court must then determine whether in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance. Id., 104 S. Ct. at 2066. "We strongly presume that counsel's conduct was within the wide range of reasonable assistance, and that he exercised acceptable professional judgment in all significant decisions made." *Hughes v. Bore*, 898 F.2d 695, 702 (9th Cir. 1990) (citing *Strickland* at 466 U.S. at 689, 104 S. Ct. at 2065).

Second, a petitioner must affirmatively prove prejudice. *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id., 104 S. Ct. at 2068.

In *Fretwell*, however, the Supreme Court has emphasized other language from *Strickland* to further define what is necessary for a petitioner to prove the prejudice prong of his ineffective assistance of counsel claim, almost adding what appears to be a third prong to the analysis. The *Fretwell* Court held that prejudice concerns not only whether the outcome would have been different but for counsel's errors, but more importantly evaluates whether the entire trial was fundamentally unfair or unreliable because of counsel's ineffectiveness.

> Thus, an analysis focusing solely on mere outcome determination. without attention to whether the

> result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

*Lockhart v. Fretwell.* 506 U.S. at 369-70, 113 S. Ct. at 842-43. Therefore, if the court finds that counsel's performance fell below an objective standard of reasonableness, and that but for counsel's unprofessional errors, the result of the proceeding would have been different, the court must then ask whether despite the errors and prejudice, was the trial fundamentally unfair or unreliable.

Analysis

Petitioner alleges that his counsel was ineffective in failing to investigate petitioner's claim that another person committed the murder. According to petitioner, he got into a knife fight with an Englishman at Arons' house. The Englishman stabbed petitioner in the arm and leg. While there, petitioner saw Arons get cut on the hands by the Englishman. Petitioner denied stabbing anyone, and said that he took a knife away from the Englishman and ran out of the house.

Attached to the petition as exhibit G is a copy of petitioner's statement to English authorities after he was taken into custody on October 2, 1990. Petitioner told the authorities that he was stabbed by the Englishman at Arons' house. Petitioner stated that the Englishman and Arons were arguing about a club Arons owned. The Englishman then went to the kitchen and got two knives. He then began waving them around, cutting petitioner's arm and leg. Petitioner took a knife away from the Englishman then left. Arons was still alive when he left. Petitioner did not tell the police about

the attack because the Englishman said he would get him: "There are a lot of dangerous people about, my father's house was shot at twice."

On February 8-, 1999, petitioner's present counsel submitted a declaration in support of this claim. He states that as part. of his investigation he reviewed all of the reports and other documents provided to petitioner's trial counsel. Among those materials is Sacramento police Department property record No. 5022' 50223 consisting of three pages, which lists and describes 30 items of property discovered at the scene of the killing. The property record indicates that in addition to items of clothing belonging to the victim, six items of clothing of unknown ownership were discovered at the scene. Attached to counsel's declaration as Exhibit A is a copy of this property record.

Petitioner argues that the property record supports his claim that trial counsel failed to investigate a defense that the killing was committed by another person. Petitioner argues that the property record provides circumstantial evidence in support of this defense because it indicates the existence of clothing not belonging to Arons at the scene, which clothing neither fit Arons nor petitioner, and which suggests that a third party was present.

Respondent argues, and this court agrees, that petitioner cannot show prejudice from counsel's failure to investigate the Englishman defense because the evidence of guilt against him was strong. Before the killing, petitioner told Florrie Bruno that he had previously robbed an old man who he did gardening for, presumably Arons. On the night of the murder, petitioner's friends drove him to the victim's house. After waiting outside for 20 minutes, the women knocked on the front door and rang the bell. When no one responded, they left. The morning after the murder petitioner was seen with bloody clothing. The victim's blood was found on

petitioner's tennis shoe. He then fled to England.

In contrast with the evidence presented at trial, petitioner's story that an Englishman stabbed Arons is rather preposterous. Other than a few items of clothing that fit neither petitioner nor Arons and petitioner's word, there was no evidence to support this defense. Despite present counsel's investigation, there remains no evidence to this day substantiating the existence of any Englishman. Faced with this evidence, it is extremely unlikely that a jury would have found petitioner innocent.

Petitioner faults trial counsel for positing an equally preposterous theory to the jury-that of a homosexual advance by Arons which resulted in homicidal madness on the part of petitioner. Trial counsel, who did not have the testimony of petitioner to support such a theory, pointed to the naked state of Aron's body along with other weak circumstantial evidence, e.g., the long unexplained length of time that petitioner had remained in Aron's house. Trial counsel was hoping for a miracle verdict by the jury for a manslaughter lesser included offense.

Yes, this homosexual rage theory was preposterous as well given the evidence. But other than give up, what was counsel to do? It is not ineffectiveness for counsel to choose one bad theory out of a rotten bunch. Moreover, counsel did more than just proffer an unlikely theory. He did make valiant efforts to defeat the prosecutions' special circumstance charges of robbery/burglary felony murder based on a reasonable- doubt that petitioner had the required felonious intent prior to the commission of the murder. See e.g., *People v. Haves*, 52 Cal. 3d 577, 625-626, 276 Cal. Rptr. 874, 903-904 (1990) (where counsel made the same attempt, albeit also unsuccessful.) This attack had a potential for success, and would have benefitted petitioner's sentence greatly had it actually succeeded.

The court cannot find that trial counsel was ineffective for not substituting the Englishman theory for that of a homosexual rage. Even if reviewed de novo, the conclusion of the California Supreme Court in rejecting the habeas petition on this theory was correct.

C. Motion for Substitute Counsel

Background

Petitioner contends that the trial court improperly denied his Marsden motions requesting substitute counsel.

The court will begin by describing the Marsden hearings in more detail below.

The first Marsden hearing was held January 14, 1992. The transcript from this hearing (RT 9-15) was separately lodged on March 5, 1998. The court began the hearing by asking petitioner why he was making the request. RT at 10. Petitioner gave the court five reasons for his motion: 1) counsel failed to appear at his arraignment; 2) counsel failed to make a discovery motion; 3) counsel refused to have the blood on the clothes tested because he was afraid that petitioner might change his story; 4) counsel filed motions to set aside the information and for a continuance without consulting petitioner; and 5) counsel failed to use petitioner's proper name in the motions. RT at 10. The court then asked counsel when he was appointed to represent petitioner. RT at I I - Counsel stated that he was appointed before the preliminary hearing. RT at 11. The court then asked counsel if he had taken the usual steps to prepare himself, including obtaining discovery. RT at 11. Counsel answered that he had. RT at 11. The court then asked counsel for some brief information regarding his law practice. RT at 11. Counsel told the court that he had handled hundreds if not thousands of felony cases. RT at 12. With respect to petitioner's

complaints, counsel stated that he did not appear at petitioner's arraignment because of a calendaring error. RT at 12. Counsel stated that he told petitioner that discovery was complete, and that under Proposition 15, a formal discovery motion would require reciprocal discovery which could be dangerous. RT at 12. He felt that the risks outweighed the benefits. RT at 12. Counsel stated that petitioner was provided with copies of the motions filed in the case. RT at 13. Counsel conferred with petitioner either at or slightly after the time the motions were filed to advise him regarding their legal effect. RT at 13. Counsel stated that the Marsden hearing was the first time he had heard petitioner's complaint regarding his name. RT at 13. Counsel also made the following comments regarding his representation of petitioner:

> ... representing Mr. Lal has been somewhat difficult in that he has told both myself and my investigator a couple of diametrical opposed stories at various times of what was suppose to happen in the case. That, of course, makes it quite difficult to investigate facts and prepare a defense.
>
> I have declined requests that I construe to be requests for information that would allow Mr. Lal to prepare a story or defense based on certain information that he seems to believe exists, and I have no idea if it does nor it doesn't. I explained to him that it just doesn't work that way, that he needs to tell me what the facts are, and I will go from there. In that, he doesn't make up the facts after getting information from me.

RT at 13-14.

The court asked counsel, "So your explanation you don't want to request that the blood be analyzed until you're sure which of the

two stories Mr. Lal is going to settle on?" RT at 14. Counsel answered, "That's exactly right." RT at 14. The court then denied the motion finding that cause had not been established and that counsel's explanations were believable and reasonable. RT at 15. The second Marsden hearing was held on June 10, 1992-the third day of the jury trial. On March 5, 1998, respondent lodged a copy of the transcript from this hearing (Augmented Reporter's Transcript, pages 1-29). The court asked petitioner why he felt his counsel was not adequately representing him.

Petitioner began by stating that "I have been trying to tell [counsel] that I am not going to take the stand, and I am pleading not guilty, which he does not want to..." Aug. RT at 3. Second, petitioner complained that the court denied the prosecution's motion for a second blood sample from petitioner, but that his counsel told him that the court had granted it. Aug. RT at 4. Third, petitioner complained that they were in the process of picking the jury but had still not decided "which way we are going to go on this." Aug. RT at 4. Petitioner complained that he did not have a list of the witnesses. Aug. RT at 4. Petitioner also complained that counsel told him that he had tape recordings, but had given petitioner no information regarding them. Aug. RT at 5. In addition, petitioner stated that he was told that the prosecution had clothes with blood on it and cigarettes, but his counsel made no discovery motion regarding this evidence. Aug. RT at 5. Petitioner also stated that he smokes Benson & Hedges cigarettes, but when he was arrested in England all they had were Marlboros, which he smoked. Aug. RT at 5. Petitioner states that these Marlboro cigarettes were kept in evidence, although his counsel did not investigate them.

Fourth, petitioner complained that when he asked his counsel for transcripts, counsel told petitioner that his dad would have to get them. Aug. RT at 6. Finally, petitioner complained that his counsel implied to the jury that he would take the stand when he would not.

Aug. RT at 8. This is because petitioner did not have any of the paperwork from his case and did not have everybody's statements. Aug. RT at 8.

The court then asked counsel to respond to petitioner's complaints. Counsel told the court that he did his best to investigate the case, including locating and inter-viewing all witnesses. Aug. RT at 9. This was difficult because several witnesses were hiding because of alleged threats made by petitioner and his family. Aug. RT at 9. Counsel stated that petitioner had told both him and the investigator a couple of different stories regarding what was supposed to have happened. Aug, RT at 10. Counsel stated that petitioner never really settled on one story, which made it difficult to focus on a defense theory. Aug. RT at 10.

Counsel stated that petitioner told one story concerning homosexual activity for money, with a suggestion that the entry of the residence was for the purpose of collecting some money that was owed, and a fight broke out. Aug. RT at 10. Counsel advised petitioner that assuming this story was the truth, petitioner would have to testify because no one else had knowledge of these facts. Aug. RT at 11. Petitioner responded that if he admitted stabbing the victim, no one would believe anything else he had to say about it. Aug. RT at 11. Counsel stated that petitioner wanted to deny responsibility for the stabbing, which was not a tenable position given the evidence. Aug. RT at 11.

Counsel stated that petitioner had been provided with all the written discovery material that had been provided by the District Attorney. Aug. RT at I I - 12. Counsel again explained that he did not file a formal discovery motion because of concerns regarding Proposition 115. Aug. RT at 12.

Counsel went on to describe an instance of petitioner's non-

cooperation. He had petitioner examined by a psychiatrist who tried to administer several clinical psychological tests. Aug. RT at 12. Petitioner completed the tests by randomly marking the questionnaires and sending them back. Aug. RT at 12. Counsel stated,

> There has just been a long history of obstructionism and non cooperation with me on Mr. Lal's part. I think because he doesn't trust the system and he doesn't trust me as a part of that system. I have done everything that I can to overcome that distrust. And here we are. Aug. RT at 12.

Counsel stated that he explained to petitioner that he has the right to take the stand and that it is his (petitioner's) decision. Aug. RT at 13. Counsel stated that he advised petitioner to take the stand assuming that the story he told about the sexual activity was truthful. Aug. RT at 13. With respect to the blood samples, counsel stated that blood samples taken at the time of the arrest were either misplaced or had become unusable, so the prosecution asked to take a new sample from petitioner. Aug. RT at 13. Counsel did not object and the motion was granted. Aug. RT at 14. Counsel stated that petitioner asked him for a transcript from this hearing, and counsel advised him that transcripts are not ordinarily prepared until a case is over. Aug. RT at 14. Counsel told petitioner that the only way he could obtain a transcript would be to contact the reporter and pay for it at that time. Aug. RT at 14. Counsel told petitioner that he could have his father obtain the transcript. Aug. RT at 14.

Petitioner then insisted that the trial court had denied the prosecutor's request to take another blood sample. Aug. RT at 15-16.

The court told petitioner that there was an order in the file dated May 26, 1992, ordering him to allow the Sacramento Police Department to take a blood sample. Aug. RT at 17. The court then asked counsel to comment on his communication with petitioner. counsel stated,

> Well, as indicated, there have been quite a few long drawn out communications between myself and Mr. Lal. I think that the conflict here is that, as I stated, Mr. Lal just doesn't trust the system. And I don't know what else to say about it. I spent the better part of an hour with him over last weekend. And my also met with him independently. Aug. RT at 18.

Counsel denied that he refused to communicate with petitioner. Aug. RT at 18.

Counsel admitted that petitioner was correct that he did not know what he was going to say in his opening statement. This was because he did not know if petitioner would take the stand. Aug. RT at 18. Counsel told the court that he had provided petitioner with "copies of everything in writing" that he had. Aug. RT at 19. He did not provide petitioner with tape recordings of witness statements because tape recorders were not permitted in jail. Aug. RT at 19. Counsel said that he had not had the tapes transcribed, but he told petitioner what these witnesses would say. Aug. RT at 20.

With respect to clothing and other objects of evidence that were tested, counsel stated that he informed petitioner of the results. Aug. RT at 21-22. Counsel also stated that he had requested that petitioner's property be returned to him, and that he would follow up on this request. Aug. RT at 26.

Counsel stated that a cigarette butt with petitioner's fingerprint on it

had been found in the victim's house. Aug. RT at 22. Counsel believed it was a Marlboro cigarette. Aug. RT at 22. Counsel stated that he did not see how the brand of cigarettes petitioner smoked in the airport would have an evidentiary value. Aug. RT at 22.

In denying the Marsden motion the court stated,

> Mr. Lai, Mr. Smith is a very experienced criminal defense attorney. I find that he has properly represented you. And will continue to properly represent you. You are going to have to assist him to the extent that you can. There has not been a breakdown in the relationship between Mr. Smith and Mr. Lai of such kind as would make it impossible for him to represent Mr. Lai. That is Mr. Smith to represent Mr. Lai. Aug. RT at 27-28.

The third Marsden hearing was held June 26, 1992. On March 5, 1998, respondent lodged the transcript from this hearing (augmented reporter's transcript, pp. 1402-1415). The motion was made during the middle of petitioner's counsel's closing argument. During the middle of the argument, petitioner interrupted by saying, "Your Honor, I would like to object to this. I don't know what counsel is doing." RT at 1400. The court then asked the jury to step out of the courtroom. Petitioner stated that counsel was not doing what he wanted him to do. Aug. RT at 1402. Counsel responded,

> That's true. And if that's not satisfactory, I would be happy to join in a motion to be relieved. This lack of cooperation and in fact act of sabotage of my attempts to conduct a defense in this case is getting to be beyond the point of tolerance. I have not had a client stand up and-Well not stand up-but make the equivalent of a Marsden motion in front of a jury

before. Aug. RT at 1403.

The court asked petitioner if he was making a Marsden motion and if he understood what a Marsden motion was. Aug. RT at 1403. Petitioner then stated that he wanted to "call for a mistrial." Aug. RT at 1403. Petitioner told the court that during the second Marsden hearing, he had stated that he and counsel were not working together. Aug. RT at 1404.

> He's doing what he wants, and I'm saying a different thing. And I cannot be heard unless through him. And at that. point I had told you, Your Honor, I'm pleading not guilty to this case. And how can I plead not guilty when Mr. Smith is saying, yes, he did it? And he's saying this person is lying and that person is lying. I don't know how he caught these people lying. If he has, I would like to know myself... Aug. RT at 1404.

Counsel responded that he would be guilty of malpractice if he tried to argue the case on the basis or on the theory that petitioner did not do it. Aug. RT at 1404. "That's just a decision that I have to make. I'm sorry that he's unhappy about that, but that's just how I have to call it." Aug. RT at 1404. The court denied the motion for the flowing reasons:

> I don't agree with your statement that he doesn't care about you. He's done the best he can under the circumstances, and I find that he's properly represented you and will continue to do so. And to the extent that there's a deterioration or break in the relationship, I find that due to Mr. Lal's recalcitrant attitude about these things. And there's no reason why he cannot be properly represented by Mr. Smith

if he wants to. Aug. RT at 1406.

The court warned petitioner that anything he said would be heard by the jury and could potentially adversely affect his interests. Aug. RT at 1406. The jury was then recalled and counsel began his argument. Aug. RT at 1406. When counsel made comments regarding the alleged sexual relationship between Petitioner the victim, petitioner again interrupted:

> Petitioner: I want to object, Your Honor, he has not made any statements that counsel is telling the jury.
>
> Counsel: A lot of that is due to the schizophrenic attitude that we have about sex.
>
> Petitioner: I want to talked want my dad to get me another lawyer.
>
> Court: Will the jury step outside please; please don't talk about the case. RT at 1413.

The court then warned petitioner again that the jury would consider any statements he made and that he was disrupting the presentation. Aug. RT at 1414.

Analysis

Our legal system has great difficulty in coming to grips with the situation created by a stubborn, recalcitrant client who disapproves of everything done by his lawyer, but who presents nothing but unreasonable requests and inconsistencies in place of his lawyer's advice.

To this day, petitioner has presented no clue concerning an

effe6ctive defense that was not made. The difficulty with the Sixth Amendment stems from attempting to give persons "counsel of their choice" within the constraints of realism.

The denial of a motion to substitute counsel implicates the defendant's Sixth Amendment right to counsel. *Bland v. California Dept. of Corrections*, 20 F.3d 1469, 1475 (9th Cir. 1994) (citing *United States v. Walker*, 915 F.2d 480, 485 (9th Cir. 1990)). When reviewing the denial of a motion to substitute counsel for abuse of discretion, three factors are considered: 1) timeliness of the motion; 2) adequacy of the court's inquiry into the defendant's complaint; and 3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense. *Crandell v. Bunnell*, 144 F.3d 1213, 1216 (9th Cir. 1998). These elements required under the Sixth Amendment are consistent with California state law which protects the defendant's constitutional right to counsel of his choice. See, e.g., *People v. Ortiz*, 51 Cal. 3d 975, 275 Cal. Rptr. 191, 196-97 (1990); *People v. Marsden*, 2 Cal. 3d 118, 84 Cal. Rptr. 156, 159-61 (1970).

A court is required to conduct a formal inquiry into the defendant's reasons for dissatisfaction with his counsel. *United States v. McClendon*, 782 F.2d 785, 789 (9th Cir. 1986). As to the degree of conflict, the trial court must examine "whether the asserted conflict was so great as to result in a complete breakdown of communication and a consequent inability to present a defense." *United States v. Castro*, 972 F.2d 1107, 1109 (9th Cir. 1992) (claimed conflict was so severe as to prevent all communication and ability to conduct a defense). A conflict is not sufficient to mandate substitution if the breakdown in communication is caused by the defendant's obstreperous and unreasonable refusal to cooperate with counsel. *Hudson v. Rushen*, 686 F.2d 826, 831 (9th Cir. 1982); Lee also *United States v. Torres-Rodriguez* , 930 F.2d 1375, 1380 n. 2 ("an

indigent defendant is entitled to appointed counsel, but not necessarily to appointed counsel of his choice."); see *United States v. Schaff*, 948 F.2d 501, 505 (9th Cir. 1991) (citing *Morris v. Slappy*, 461 U.S. 1, 12-14, 103 S.Ct. 1610, 1617 ("[T]here is no sixth amendment right to a 'meaningful relationship' between an accused and counsel.").

The court will first consider the timeliness of the motions. On direct review of federal district courts, the Ninth Circuit has held that motions for substitute counsel made on the eve of trial are untimely. See *Schell v. Witek*, No. 97-56197, 1999 WL 421332 at * 5 (9th Cir. June 25, 1999). However, the Ninth Circuit has refused to allow a motion requesting substitute counsel to be denied solely because it is late. Id. Even if a motion is untimely, if it would not delay the trial or inconvenience the court or the opposing party, the fact that it is untimely will not by itself justify denying the motion. Id.

In the instant case, the trial court did not expressly consider the timeliness of any of the motions. The first motion-made before trial-was clearly timely. The second and third motions were made during trial. The trial judge has discretion to deny a motion to substitute made during or on the eve of trial if the substitution would require a continuance. Bland, 20 F.3d at 1476 (citing *United States v. McClendon*, 782 F.2d 785, 789 (9th Cir. 1986). Here, the trial court did not discuss the lack of timeliness or any potential delay, nor did it indicate that timeliness was a consideration. It only stands to reason, however, that a request for new counsel denied during the third day at trial or closing argument was based in part on untimeliness. Nevertheless, this court does not find the issue of timeliness to be dispositive of the instant claim.

As to the second factor, the court finds that the trial court conducted adequate inquiries with regard to each motion. With

respect to the first and second motions particularly, the court conducted extensive inquiries regarding petitioner's complaints.

Turning to the third factor, the record indicates that the gravamen of petitioner's complaints at trial was counsel's failure to investigate and present a defense, that another person, i.e., an unidentified Englishman, committed the murder. Petitioner was ultimately unhappy with the defense chosen because it admitted that he (petitioner) killed the victim and also, perhaps, because it suggested that he and the victim had engaged in homosexual conduct. If petitioner had early-on presented criticisms such that counsel would not permit him to testify to certain facts (regardless of their probable truth), or that a fundamental difference in trial strategy was at the core of a near complete breakdown in communication, the trial court would have had no choice but to appoint new counsel. However, the court has scrutinized the transcript of the first Marsden hearing, and not once did petitioner relate that his right to testify or present an ultimate defense was being countermanded by counsel. Petitioner's complaints in this respect only became full-blown during counsel's final argument-perhaps when petitioner realized the hopelessness of his defense no matter what theory had been presented.

Moreover, the trial judge did more than just focus on counsel's competence in an attempt to persuade petitioner to stay the course with present counsel during the first Marsden hearing. He gave petitioner a chance to detail each and every complaint made, and asked for a detailed response from the attorney in-kind. There was a bona fide attempt to ascertain whether a breakdown in communication had occurred.' This is not the situation discussed by the court in *United States v. Walker*, 915 F.2d 480 (9th Cir, 1990) in which the trial court simply attempted to persuade the defendant to stick with present counsel because he was competent.

Counsel told the court that he did not want to present the Englishman defense because it was not supported by any evidence. Counsel also told the court of his difficulties in preparing for trial because of petitioner's inconsistent statements regarding what happened. As discussed above, counsel's defense strategy was not unreasonable. Between the two possible defenses, i.e., the unidentified Englishman vs. killing by petitioner, the defense chosen was at least equally believable or non-believable. This defense was also based on what petitioner told counsel had happened-at least one of the versions. By presenting counsel with different stories, petitioner placed counsel in a difficult position.

Based on the circumstances described above, the court finds that petitioner's dissatisfaction with counsel was not reasonable. Therefore, the motions for substitute counsel were properly denied. See *Hudson v. Rushen*, 686 F.2d 826, 831 (9th Cir. 1982) (holding that a defendant's unreasonable refusal to cooperate is not sufficient grounds to support a substitution of counsel); *United States v. Rahman*, 189 F.3d 88, 144 (2nd Cir. 1999); *United States v. Hillsberg*, 812 F.2d 328, 333-34 (7th Cir. 1987) (denial of motion for substitute counsel is not reversible error where defendant and counsel have disagreement over trial strategy).

Petitioner also argues that the trial court's failure to grant his request for substitution of counsel violated his right to counsel of his own choosing under the Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights. Petitioner contends that his extradition to the United States would not have been permitted had petitioner or those representing him in England been aware that he would be denied his right to counsel of his own choosing based on international law standards.

In support of this claim, on February 23, 1999, petitioner submitted

the declaration of Philip Sapsford, an English Barrister, who represented petitioner during the extradition proceedings. He states that following his receipt of an assurance from the Sacramento County District Attorney's Office that the death penalty would not be sought, Petitioner was returned to California.

Mr. Sapsford states that an English prisoner may raise violations of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) as a basis for challenging the decision to order his return to another country. On January 8, 1992, the United States ratified the International Covenant on Civil and Political Rights, which became effective on June 8, 1992. Article 6(3 ))(c) of the Convention is mirrored by Article 14(3)(b) and Article 14(3)(d) of the International Covenant of Civil and Political Rights which provides: 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing:

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in such case if he does not have sufficient means to pay for it.

Mr. Sapsford goes on to state that Article 6(3)(c) of the Convention and Articles 14(3)(b) and (3)(d) of the Covenant "simply translate into the proposition that a defendant is entitled to be represented by counsel of his choice if that is reasonably practicable There is nothing to suggest in this case that it was not reasonably practicable to substitute Laurence S. Smith." Mr. Sapsford also states at paragraph 66 of his Declaration, "The Covenant is neither

inconsistent with nor superior to the U.S. Constitution. Instead the Covenant compliments [sic] the right of an individual as provided by the U.S. Constitution."

This court previously understood petitioner to be arguing that his right to counsel under international law was somehow greater than that provided under the Sixth Amendment, and that procedural mechanisms to ensure Sixth Amendment/Treaty compliance rose to the level of substantive protection. See Order of Nov. 9, 1998. However, Mr. Sapsford is claiming that petitioner's right to counsel under international law is equal to that provided under the Sixth Amendment, and petitioner would not have been extradited had English authorities known that this right would not be respected. Because petitioner's Sixth Amendment rights were not violated, as found above, this argument must fail. In addition, assuming -he equality of the equation between the Sixth Amendment and the Treaty, it is established Sixth Amendment jurisprudence that there is no right to counsel of one's choice for an indigent defendant. Coplin 491 U.S. 617, 624, 109 S. Ct. 2646, 2651-52, *Morris v. Slappy supra* 461 U.S. at 10, 10' S. Ct. at 1615.

The denial of this claim by the California Supreme Court was not an unreasonable application of clearly established federal law. Accordingly, this claim should be denied.

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served Aith these findings and recommendations, any party may file written objections with the court and serve a copy on all par-ties. Such a document should be captioned "Objections to Magistrate Judge's

Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 199 1).

DATED: December 7, 1999.

GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE